Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

PATRICK SARULLO,

Petitioner,

v.

UNITED STATES POSTAL SERVICE; WILLIAM HENDERSON, Postmaster General; WILLIAM BROWN, Manager Human Resources United States Postal Service; THOMAS L. MODAFERRI; MARTIN C. DUBINSKI; BARBARA HIGGINS, Postal Inspectors; LINDA WYATT, Postmaster; JEFFREY KERKEN, Supervisor; MARTIN SPIELMAN, Supervisor; WILMA MEDERO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Civil Service Reform Act (CSRA) is a comprehensive procedural scheme that allows a federal employee to challenge an adverse personnel action. The plaintiff, a postal worker, filed a Fourth Amendment *Bivens*[1] action for malicious prosecution against the United States Postal Service and several postal employees who had instituted criminal proceedings against him without probable cause. The Third Circuit Court of Appeals held there was no subject matter jurisdiction over the claim because it arose out of the plaintiff's employment and is therefore subject only to the CSRA. Under *Bush v. Lucas*, 462 U.S. 367 (1983), an action for a constitutional tort can be maintained where Congress has provided a less than complete remedy for the wrong. The CSRA does not proscribe as a "prohibited personnel practice" the malicious prosecution of a federal employee, but the Third Circuit did not pursue the analysis set forth in *Bush*.

The question presented is whether a federal employee can maintain a Fourth Amendment *Bivens* claim for malicious prosecution where the CSRA fails to provide a prohibition of such action.

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1. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	2
Statutory Provision Involved	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Petition	8
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Albright v. Oliver,
510 U.S. 266 (1994) 6, 9

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,
403 U.S. 388 (1971) ..... *passim*

Brower v. County of Inyo,
489 U.S. 593 (1989) 8-9

Bush v. Lucas,
462 U.S. 367 (1983) ..... *passim*

Carlson v. Green,
446 U.S. 14 (1980) 8, 11

Davis v. Pashman,
442 U.S. 228 (1979) 11

Heck v. Humphrey,
512 U.S. 477 (1994) 12

Lindahl v. OPM,
470 U.S. 768 (1985) 9

Saul v. United States,
928 F.2d 829 (9th Cir. 1991) 9

Cited Authorities

	Page
Schweiker v. Chilicky, 487 U.S. 412 (1983)	8, 11
Terry v. Ohio, 392 U.S. 1 (1968)	8
United States v. Fausto, 484 U.S. 439 (1988)	9
Statutes:	
5 U.S.C. § 2302	2, 9
5 U.S.C. § 2302(a)	7
5 U.S.C. § 2302(b)	7
28 U.S.C. § 1254(1)	2
Rules:	
Fed. R. Civ. P. 12(b)(6)	6
United States Constitution:	
First Amendment	10
Fourth Amendment	*passim*
Fifth Amendment	11

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Filed December 19, 2003 ..... 1a

Appendix B — Judgment Of The United States Court Of Appeals For The Third Circuit Dated December 19, 2003 ..... 25a

Appendix C — Amended Letter Re: *Patrick Sarullo v. U.S. Postal Service et al.* Of The United States District Court For The District Of New Jersey Filed October 1, 2001 ..... 27a

Appendix D — Memorandum Opinion And Judgment Of The United States Court Of Appeals For The Third Circuit Filed September 28, 2001 ..... 30a

Appendix E — Letter Re: *Patrick Sarullo v. U.S. Postal Service et al.* Of The United States District Court For The District Of New Jersey Dated October 4, 2000 ..... 35a

Appendix F — Final Order Of The United States District Court For The District Of New Jersey Filed October 11, 2000 ..... 55a

Appendix G — Opinion And Order Of The United States District Court For The District Of New Jersey Dated April 2, 1998 ..... 57a

Appendices

Page

Appendix H — Opinion And Order Of The United States District Court For The District Of New Jersey Dated December 18, 1997 ..... 75a

Appendix I — Statute Involved 93a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the United States District Court for the District of New Jersey granting the motion by defendants United States Postal Service, William Brown, Thomas L. Modaferri, Martin C. Dubinski, Linda Wyatt, Jeffrey Kerken, Martin Spielman and Wilma Medero for dismissal of all claims, except the plaintiff's claim for malicious prosecution, is unpublished and appended at Pet.App. 75a. The Opinion of the United States District Court for the District of New Jersey granting in part and denying in part the individual postal defendants' motion for reconsideration and dismissing the complaint as to defendant William Brown is unpublished and appended at Pet.App. 57a. The Opinion of the United States District Court for the District of New Jersey granting the defendants' motion for summary judgment, dismissing the complaint, and denying the plaintiff's motion for leave to amend the complaint, is unpublished and appended at Pet.App. 35a. The Opinion of the United States Court of Appeals for the Third Circuit granting the motion to dismiss by defendant Wilma Medero is unpublished and appended at Pet.App. 30a. The Opinion of the United States Court of Appeals for the Third Circuit affirming the grant of summary judgment in favor of defendants and dismissing the *Bivens* claim for lack of subject matter jurisdiction (Pet.App. 1a) is published at 352 F.3d 789.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered its opinion and order on December 19, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant provision of the Civil Service Reform Act of 1978 is 5 U.S.C. § 2302, which is reprinted in the Appendix at 93a.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Patrick Sarullo began his employment with the United States Postal Service on May 1, 1982. In the Fall of 1992, he became the focus of an investigation by Postal Inspector Thomas Modaferri, who had received information that a postal employee named "Pat" was selling drugs to employees at the South Plainfield, New Jersey, post office. The inspector

arranged for Wilma Medero to be hired at South Plainfield as a casual clerk, but in actuality to work undercover to discover any drug sales being made inside the post office. Medero identified Patrick Sarullo as the source of the drug sales. On four occasions, Medero allegedly set up arrangements to buy narcotics from Mr. Sarullo. On each occasion, Modaferri and two other postal inspectors, Karen Higgins and Martin Dubinski, met with Medero outside the post office. Medero was searched and given money and a tape recorder. She went into the post office alone, with no surveillance, where she remained for 40 minutes to an hour before coming back out. The first time, she told the inspectors that Mr. Sarullo had no drugs but his wife would be bringing heroin later. The second time, she gave the inspectors a foil package and change from the money. The third time, she gave Modaferri a foil package filled with a white powdery substance and change from the money. The fourth time, she gave Modaferri a plastic baggy containing a white powdery substance. Each time she said he handed her drugs and she handed him the money.

Chemical analysis of the white powdery substance found it to be cocaine. None of the tape recordings contained any drug-related conversations. On July 14, 1993, Modaferri signed a criminal complaint against Mr. Sarullo, stating that there was probable cause for an arrest because of a controlled buy witnessed and monitored by him. That same day, Modaferri and two South Plainfield police officers arrested Mr. Sarullo at his home.

On August 7, 1993, Mr. Sarullo was terminated from his position with the postal service. Modaferri issued a Letter of Presentment to the Middlesex County Prosecutor's Office recounting the series of alleged "controlled buys." He was

indicted, and on October 2, 1994 he was tried. At trial, Medero and the postal inspector testified that no face to face hand-offs of drugs or money were made. The jury was unable to reach a unanimous verdict. On March 20, 1995, the indictment was dismissed on the State's motion.

In actuality, there were no "controlled buys". There were no hand-offs of drugs and money. The postal inspectors failed to follow the proper procedures and violated the standards set by the United States Postal Service. In a Hearing Before the Committee on Post Office and Civil Service in the House of Representatives of the United States Congress held on May 2, 1994 that investigated abuses of power by the Postal Inspection Service, Chief Postal Inspector Kenneth Hunter testified about the culture of "collars for dollars" within the inspection service. He set forth some of the proper standards for the use of informants: (1) Inspectors must verify the reliability and credibility of informants before using information gained from them in any criminal or administrative proceeding; (2) Independent corroboration of information provided by informants is required; (3) Informants must be polygraphed when no other verification is possible; (4) Informants must be polygraphed when questions arise about their credibility. In a proceeding before the Merit Systems Protection Board on March 8, 1994, Postal Inspector James R. Miller testified that an inspector has to make sure he can observe the buys. He testified as to the procedure to be used to observe the buys, namely to have the buy take place in locations where there is an observation or lookout gallery, on a street corner, or if it is in a bar or restaurant, to make sure that someone in the law enforcement community is available to be in those places to observe. In operations using informants, they are to be wired with transmitters and recording devices so the conversations can

be heard. Inspector Miller stated that an identification is not to be made solely on the information from a confidential informant. The reliability of a confidential informant is to be assessed on every buy, and an inspector is to be continually assessing exactly how reliable that information is and independently determining the truth of any information.

The reliability of the confidential informant here was never assessed by Modaferri. Medero has more than five aliases. She uses two Social Security numbers and two birth dates. She has pled guilty to shoplifting, making false reports, possession of CDS, larceny, receiving stolen property, and distribution of heroin. She has been charged with contempt of court. There was no independent verification of Medero's information, but she was never polygraphed. Medero was never given a drug test during the investigation. No one ever witnessed the alleged "buys". The one time an inspector went inside the post office, he could only see the tops of heads and could not see hands.

The other times, Medero went into the post office by herself and stayed there for 40 minutes to an hour before coming out with packages of drugs. Modaferri and the other inspectors searched Medero outside the post office before she went in, but the search was done in a van and was admittedly not thorough. In any event, Medero had a locker with a combination lock on it inside the post office. She reported to work hours before she called Modaferri and before being searched by the inspectors. She was inside the post office without being watched for close to an hour each time before coming out with the drugs. She had free rein to do whatever she wanted and to go wherever she wanted inside the post office. When she came out of the post office with foil packages, she was not subjected to a polygraph.

Fingerprints from the drug packages were not taken. Medero was not tested for drugs.

Modaferri lied on the criminal complaint against Mr. Sarullo and in the Presentation Letter. He stated in the criminal complaint that he had witnessed and monitored a controlled buy of CDS. He neither witnessed nor monitored anything. He stated in the Letter that he had recorded and continually monitored the conversations through the Nagra tape recorder worn by Medero. He failed to mention that these conversations did not include any talk about drugs. Modaferri stated in the Letter that Medero gave Mr. Sarullo money and Mr. Sarullo then handed drugs to her. Modaferri repeated this at his Grand Jury testimony. But Medero testified at the trial that there were no meetings with Mr. Sarullo and that she got the drugs each time from a drawer when Mr. Sarullo was not around.

Mr. Sarullo filed a complaint against the United States Postal Service and several individual defendants, including Modaferri and Medero, which included a claim for malicious prosecution. The defendants filed a Fed. R. Civ. P. 12(b)(6) motion for dismissal, and the United States District Court for the District of New Jersey dismissed all claims except the claim for malicious prosecution, ruling that because the claim is a *Bivens* claim that is not employment-related, it is not subject to the Civil Service Reform Act (CSRA). The District Court noted that malicious prosecution is cognizable as a constitutional tort under *Albright v. Oliver*, 510 U.S. 266 (1994), and held that plaintiff had adequately alleged a claim for malicious prosecution under *Bivens*. The District Court found that the claim that the defendants wrongfully caused the State of New Jersey to prosecute Mr. Sarullo on drug charges is not capable of being

characterized as an employment-related grievance or "adverse personnel action." The Court stated that bringing about a state criminal prosecution cannot be considered a "personnel action" as that term is defined in the CSRA. 5 U.S.C. §§ 2302(a) and (b). [Pet.App. 32a] Nor is malicious prosecution a "prohibited personnel practice" as set forth in 5 U.S.C. § 2302(b).

The United States Court of Appeals for the Third Circuit disagreed, ruling that the claim is employment-related and that under *Bush v. Lucas*, 462 U.S. 367 (1983), the CSRA affords Mr. Sarullo the exclusive remedy for his malicious prosecution claim. The Third Circuit stated that there is no reasonable explication of the CSRA which would have them decide that dealing drugs at work is not related to the employment context, and that because Mr. Sarullo's status as a federal employee is central to his malicious prosecution complaint, the CSRA precludes his claim. The Third Circuit noted Mr. Sarullo's argument that his claim for malicious prosecution does not fall within the scheme of remedies provided by the CSRA so that he is entitled to prosecute a *Bivens* claim, but found that while placing a tape recorder on the informant did not itself constitute a "personnel action" within the CSRA's statutory scheme, the tape recording was not a central factor that led to his arrest and prosecution and was only a small part of the overall investigation. This led the Third Circuit to conclude that the claim for malicious prosecution clearly arises in the employment context, and that the CSRA provides Mr. Sarullo with his sole remedy. Therefore, the Third Circuit held that the *Bivens* claim was barred by the CSRA and the District Court lacked subject matter jurisdiction to hear it. [Pet.App. 9a to 10a]

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons. First, the United States Court of Appeals for the Third Circuit erred in finding that malicious prosecution is employment-related. Second, the decision of the United States Court of Appeals for the Third Circuit conflicts with this Court's decision in *Bush v. Lucas*, *supra*, because the Third Circuit failed to follow the analysis set forth by this Court with respect to determining whether a *Bivens* action can be maintained when a claim arises from an employment relationship.

The Petitioner's claim constitutes a constitutional tort under *Bivens*, in which this Court held that individuals may assert private actions for damages against federal officials pursuant to the United States Constitution. A *Bivens* action can be maintained in two circumstances: (1) Congress has not created an "equally effective remedy and declared it to be a substitute for recovery under the Constitution"; (2) in the absence of action by Congress, there are no "special factors" that counsel hesitation. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). "Special factors" exist where Congress has legislated an elaborate and comprehensive remedial scheme. *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1983). Where the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, the Court has declined to create addition *Bivens* remedies. *Schweiker*, *supra*, 487 U.S. at 423.

The constitutional tort here is the violation of the Fourth Amendment by employees of the United States Postal Service in the arrest and seizure of Mr. Sarullo without probable cause. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Brower v. County*

of Inyo, 489 U.S. 593 (1989). This is the gravamen of the malicious prosecution claim. In *Albright v. Oliver*, 510 U.S. 266 (1994), this Court held that malicious prosecution claims based on Fourth Amendment violations are actionable. The Third Circuit here held that measures designed to investigate an employee who is dealing drugs at work are actions arising out of the employment context and are subject to the CSRA, thereby precluding the maintenance of a *Bivens* action.

The CSRA is a comprehensive scheme that includes a framework for evaluating adverse personnel actions against federal employees. *Lindahl v. OPM*, 470 U.S. 768, 774 (1985). The CSRA is codified in various sections of the United States Code. Under one of the three main sections that govern personnel action, Chapter 23, certain "prohibited personnel practices" by an agency are set forth. Prohibited personnel practices include unlawful discrimination, coercion of political activity, nepotism, and reprisal against whistleblowers. 5 U.S.C. § 2302. *United States v. Fausto*, 484 U.S. 439, 445-46 (1988). They do not include maliciously prosecuting an employee.

The malicious prosecution of Mr. Sarullo was not related to his employment. As noted by the Third Circuit, in *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991), it was held that the CSRA prevents federal employees from bringing *Bivens* actions to job-related wrongs. [Pet.App. 11a n.5] But the "wrong" here is malicious prosecution – the institution of a criminal action without probable cause and resulting in the arrest and incarceration of Mr. Sarullo. This is not a job-related wrong. It is completely separate and apart from the employment context and cannot be shoe-horned into the list of prohibited personnel practices. Therefore, the Third Circuit was wrong to find that the malicious prosecution action is subject to the CSRA.

This Court in *Bush v. Lucas* set forth an analysis for determining whether a *Bivens* claim can be maintained where a federal employee is subject to a remedial scheme promulgated by Congress. The Third Circuit failed to follow this analysis. In *Bush v. Lucas*, it was held that there could be no *Bivens* First Amendment claim because the CSRA provides back pay and reinstatement remedies for wrongful treatment. The plaintiff sought damages for defamation and retaliatory demotion. This Court assumed that plaintiff's First Amendment rights were violated by an adverse personnel action and held that the action was subject to the CSRA. This Court noted that the CSRA is a comprehensive procedural scheme providing a range of remedies and is an "elaborate, comprehensive scheme" promulgated by Congress. Constitutional challenges to agency action are fully cognizable within the system, and it provides meaningful remedies for employees who have been unfairly disciplined for making critical comments about their agencies. 462 U.S. at 385-86. This Court stated:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

462 U.S. at 388. The Third Circuit did not ask this question and did not analyze the CSRA in this vein with particular attention paid to a malicious prosecution claim.

In *Schweiker v. Chilicky*, this Court applied the *Bush* reasoning and declined to create a *Bivens* remedy for the improper denial of Social Security disability benefits resulting from due process violations because it was convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it. In his dissent in *Schweiker v. Chilicky*, *supra*, 487 U.S. at 442-43, Justice Brennan, joined by Justice Marshall and Justice Blackmun, noted that in *Bush*, the Court declined to create a *Bivens* action for aggrieved federal employees not because Congress is simply competent to legislate in the area of federal employment relations, but because Congress is far more capable of addressing the special problems that arise in those relations than are the courts. It was noted that in *Davis v. Passman*, 442 U.S. 228 (1979), a cause of action under the Fifth Amendment's Due Process Clause was recognized for a congressional employee who alleged sex discrimination even though Congress is competent to pass legislation governing employment relations of its own Members, and that in *Carlson v. Green*, 446 U.S. 14 (1980), a *Bivens* action was created for redress of injuries flowing from the unconstitutional conduct of prison officials even though Congress had expressly and competently provided a statutory remedy in the Federal Tort Claims Act. Justice Brennan stated that these claims were permitted because they arose in areas in which congressional competence is no greater than that of the courts and in which, therefore, courts need not fear to tread even in the absence of congressional action.

With respect to malicious prosecution based on a Fourth Amendment violation, congressional competence is no greater, and is even less, than that of the courts. The CSRA is not an elaborate remedial system constructed step by step

by Congress with respect to a Fourth Amendment malicious prosecution against a federal employee. There is no congressional legislative activity in the CSRA regarding a Fourth Amendment malicious prosecution against a federal employee. There is no evidence that Congress gave careful attention, or any attention at all, to Fourth Amendment malicious prosecution against a federal employee. Congress has not provided any prohibition against nor any remedy for malicious prosecution by federal employees.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the issue was whether an inmate can recover damages under section 1983 when a state police officer and county prosecutors engaged in an unlawful, unreasonable and arbitrary investigation leading to his arrest, knowingly destroyed exculpatory evidence, and caused an illegal and unlawful voice identification procedure. This Court decided that the common law cause of action for malicious prosecution provides the closest analogy to the claims and noted that a successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society. 512 U.S. at 484. There is no such remedy in the CSRA. Therefore, the CSRA is not a sufficient remedial scheme that can be considered an adequate, let alone an equally effective remedy, in contrast to a *Bivens* claim.

The failure of the Third Circuit to follow the analysis set forth by this Court in *Bush v. Lucas* resulted in a decision that conflicts with *Bush v. Lucas*. Properly applying the analysis leads to the conclusion that the institution of criminal proceedings without probable cause against Mr. Sarullo, resulting in his arrest and incarceration, is not covered by

the CSRA, and is in an area in which congressional competence is less than that of the courts. Therefore, the CSRA is not applicable here, and the District Court had subject matter jurisdiction to hear the *Bivens* Fourth Amendment claim. Accordingly, it should not have been dismissed by the Third Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED DECEMBER 19, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-4203

PATRICK SARULLO,

Appellant

v.

UNITED STATES POSTAL SERVICE; WILLIAM HENDERSON, POSTMASTER GENERAL;* WILLIAM BROWN, MANAGER HUMAN RESOURCES UNITED STATES POSTAL SERVICE; THOMAS L. MODAFERRI; MARTIN C. DUBINSKI; BARBARA HIGGINS, POSTAL INSPECTORS; LINDA WYATT, POSTMASTER; JEFFREY KERKEN, SUPERVISOR; MARTIN SPIELMAN, SUPERVISOR; WILMA MEDERO.

On Appeal for the United States District Court
for the District of New Jersey
(D.C. No. 96-cv-03241)
District Judge: Honorable Nicholas H. Politan

Argued: September 18, 2002

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* William Henderson is substituted for his predecessor, Marvin Runyon, as Postmaster General of the United States Postal Service, pursuant to Fed. R.App. P. 43(c)(2).

Appendix A

Before: BECKER, *Chief Judge*,** SCIRICA*** and McKEE, *Circuit Judges*

OPINION OF THE COURT

PER CURIAM.

Patrick Sarullo, a former employee of the United States Postal Service, was arrested for dealing drugs at work and was subsequently discharged. Sarullo, denying the charge, brought a *Bivens* action for malicious prosecution arising out of the arrest and also a claim against the Postal Service under Title VII for discrimination based on age and national origin and retaliation for a previous EEO claim. The District Court granted summary judgment for the Postal Service, holding (1) that Sarullo's allegations could not defeat the individual defendants' qualified immunity with respect to the *Bivens* claim; and (2) that Sarullo had not established a *prima facie* case of employment discrimination or retaliation. We affirm with respect to the discrimination and retaliation claims. With respect to the *Bivens* claim, we dismiss for lack of subject matter jurisdiction on the grounds that the Civil Service Reform Act affords Sarullo the exclusive remedy for his malicious prosecution claim. We therefore need not reach the question of qualified immunity discussed by the District Court.

** Judge Becker's term as Chief Judge ended on May 4, 2003.

*** Judge Scirica became Chief Judge on May 4, 2003.

Appendix A

I. BACKGROUND

In the fall of 1992, Sarullo became the focus of an investigation being conducted by agents of the United States Postal Service ("USPS"). Postal Inspector Thomas Modaferri received information from Postmaster Zeevalk of the Westfield Post Office that a postal employee named "Pat" who lived on Cherry Street, was selling drugs to postal employees inside the South Plainfield post office ("South Plainfield"). Based on this information, Inspector Modaferri initiated an investigation. He first spoke with South Plainfield Postmaster Linda Wyatt to determine if an employee named "Pat" lived on Cherry Street in South Plainfield. She informed Modaferri that Pat Sarullo was the only employee named "Pat" in South Plainfield and confirmed that Sarullo lived on Cherry Street. Modaferri did not inform Wyatt why he was inquiring.

Shortly thereafter, Wilma Medero was hired at South Plainfield as a casual clerk. Medero had worked as a police informant in Plainfield on over 125 investigations, and was highly recommended by the Plainfield Police Department. Medero was asked to assist in Modaferri's investigation even though (or perhaps because) Medero had a criminal record.[1] While assisting in the investigation, Medero was expected

1. Although Sarullo faults Modaferri for relying upon someone with a criminal record, Modaferri may well have reasoned that someone with Medero's criminal background would know how to learn if illegal drugs were being sold. Medero would presumably also be sufficiently familiar with the culture surrounding illicit sales of controlled substances to know how to win the confidence of the seller without arousing the suspicion of the seller.

to appear for work and perform her assigned duties while simultaneously trying to learn about any drug sales inside the post office. She was not told that an employee named "Pat" was targeted or under suspicion, nor was she given any other information about the investigation. Nevertheless, based upon information she learned while working at South Plainfield, Medero soon identified Sarullo as a source for narcotics inside the post office.

On December 15, 1992, Medero informed Modaferri that she had arranged to purchase drugs from Sarullo the next day. Modaferri then asked two Postal Inspectors, Karen Higgins and Martin Dubinski, to assist with the controlled buy that Medero had arranged. On December 16, Modaferri, Higgins, and Dubinski met with Medero. Modaferri searched Medero and her car and then gave her a tape recorder to record her transaction with Sarullo. Modaferri then watched as Medero entered the post office. She came back less than an hour later and told the investigators that Sarullo did not have the drugs.

Medero made arrangements to buy drugs from Sarullo again on January 11, 1993, after Sarullo had shown her $120 worth of cocaine. On January 11, Modaferri and Higgins met Medero near the post office. Medero was again searched, then given a recording device and $130 in cash, and the inspectors watched as she entered the post office. Medero returned about 40 minutes later and gave Modaferri a foil package, ten remaining dollars, and the recording device. The recorder did not contain any drug related conversations.

Appendix A

Medero arranged another buy from Sarullo on January 14, 1993. On that date, Medero telephoned Modaferri and told him that Sarullo had an "eight ball" (1/8th of an ounce of cocaine) for sale for $180. A short time later, Medero met with Modaferri, Higgins, and Dubinski. Medero was searched, then given the tape recorder, and $190 cash. This time, Dubinski attempted to watch the transaction from the upstairs gallery of the post office. However, his view was obstructed and he was not able to see Medero or Sarullo below neck level. Shortly thereafter, Medero informed Modaferri that she had purchased cocaine from Sarullo. At approximately 9:48 a.m., Medero met Modaferri and gave him a foil package filled with a white powdery substance. Modaferri then searched Medero and retrieved ten dollars remaining from the transaction as well as the tape recorder. However, once again, the recorder contained no drug related conversations. Medero arranged a final transaction for February 18, 1993. On that date, as before, Modaferri met Medero in the parking lot outside the post office. Medero was searched and given a recorder and $170, then she went into the post office. When she returned, she told the investigators that she had gone to Sarullo's station in the post office and obtained a brown paper napkin and a plastic baggy containing a white powdery substance from Sarullo's drawer. Medero gave Modaferri the powdery substance and the recording device and she was once again searched.

Chemical analysis confirmed that the powder Medero claimed to have obtained from Sarullo during each controlled buy was cocaine. Accordingly, on July 14, 1993, Modaferri and officers from the South Plainfield Police Department arrested Sarullo. Less than three weeks later, Sarullo received

a Notice of Removal from the USPS informing him that he was being terminated effective August 7, 1993 as a result of his criminal activity. Apparently undaunted by this notice, Sarullo filed a union grievance contesting his removal. On September 15, 1994, after a hearing and testimony from all relevant witnesses, an arbitrator issued an opinion upholding the termination. The arbitrator credited Medero's testimony about Sarullo's drug sales and concluded that USPS was therefore justified in terminating him.

Sarullo was subsequently indicted and tried for possession and distribution of a controlled substance. However, the jury was unable to reach a unanimous verdict and the prosecution subsequently moved to dismiss the indictment rather than attempt a retrial.

On January 20, 1995, Sarullo sought counseling from an Equal Employment Opportunity ("EEO") Counselor on his claim that he had been terminated from the post office because of his Native American ancestry. The Equal Employment Opportunity Commission ("EEOC") dismissed that claim because Sarullo had not contacted an EEOC counselor within forty-five days of his termination as required by regulations. Sarullo had waited a year and a half after his termination before contacting an EEO Counselor. Sarullo had previously made an EEO claim during his employment with the USPS. In 1989, Sarullo entered into a settlement with Steve Kubala, Sarullo's supervisor at that time, for Sarullo's EEO claim of employment discrimination and harassment based on Sarullo's race. The circumstances surrounding this settlement are the basis for Sarullo's claim that his discharge from the USPS was in retaliation for prior EEO activity.

Sarullo wrote Postmaster Wyatt on March 29, 1995, requesting reinstatement to his position with USPS. That letter was forwarded to William Brown, District Manager of Human Resources for the Northern New Jersey District, who was responsible for reinstatement decisions. Brown denied Sarullo's request pursuant to a USPS policy prohibiting rehiring persons who have been removed for cause. Brown was the only person involved in the decision not to reinstate Sarullo, and it is uncontested that Brown had no knowledge of Sarullo's race, age, or prior EEO activity when he made the decision.

II. PROCEDURAL HISTORY

On July 1, 1996, Sarullo filed suit in the United States District Court for the District of New Jersey against the USPS, Postmaster General Marvin Runyon,[2] and eight current or former USPS employees. Sarullo asserted claims for discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.* and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626 *et seq.* (the "ADEA."). The Court also interpreted Sarullo's complaint to include a cause of action for a constitutional tort under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

The District Court dismissed all Title VII and ADEA claims against all defendants except Postmaster General Runyon and USPS based upon its conclusion that Sarullo could only maintain an action for job discrimination against

2. Postmaster General Henderson was thereafter substituted as Postmaster Runyon's successor.

his employer, not against other employees. However, the District Court determined that Sarullo's *Bivens* claim against USPS survived a Rule 12(b)(6) motion.[3] The District Court based its determination that Sarullo had asserted a cause of action under Bivens for malicious prosecution on its conclusion that *Albright v. Oliver,* 510 U.S. 266, 269-71 (1994), permitted a claim for malicious prosecution to rest on a Fourth Amendment right.

The individual defendants then moved for reconsideration, arguing that the Civil Service Reform Act of 1978 ("CSRA"), Pub.L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of Title 5, United States Code), provides the only remedy for any employment related causes of action and that the District Court therefore lacked subject matter jurisdiction over Sarullo's claim of malicious prosecution. The District Court dismissed Sarullo's claim against Brown because Sarullo had not alleged that Brown was involved in the actions underlying the alleged malicious prosecution. However, the Court refused to dismiss any of the remaining claims. The Court concluded that Sarullo had alleged a *Bivens* action that "does not constitute an adverse employment action under the CSRA."

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3. In his complaint, Sarullo characterized his constitutional claim as arising under § 1981. The District Court recharacterized it as asserting a *Bivens* claim because the defendants were federal rather than state officers. *Cf. Brown v. Philip Morris, Inc.*, 250 F.3d 789, 800 (3d Cir.2001) ("A *Bivens* action, which is the federal equivalent of the § 1983 cause of action against state actors, will lie where the defendant has violated the plaintiff's rights under color of federal law."). The defendants do not object and both parties address the constitutional claim under *Bivens*. We will do the same.

Thereafter, however, the Court granted the remaining individual defendants' motions for summary judgment based upon its conclusion that each was entitled to qualified immunity. In the alternative, the District Court found that Sarullo's malicious prosecution claim failed on the merits because the defendants had probable cause to institute criminal proceedings against him.

The District Court also granted the Postmaster General summary judgment on Sarullo's claims of discrimination because there was no evidence that failure to rehire Sarullo was based on discriminatory animus or Sarullo's prior EEOC activity. The District Court concluded that the proffered reason for not rehiring Sarullo was a legitimate nondiscriminatory purpose. This appeal followed.[4]

III. DISCUSSION

A. Subject Matter Jurisdiction Under The CSRA

The CSRA provides a comprehensive statutory scheme which enables federal employees to obtain remedies for prohibited personnel practices engaged in by federal agencies. The defendants, relying upon *Bush v. Lucas,* 462 U.S. 367

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4. We examine the evidence in the light most favorable to Sarullo and resolve all reasonable inferences in his favor. *See Stewart v. Rutgers,* 120 F.3d 426, 431 (3d Cir.1997). We affirm a grant of summary judgment if there is "no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). Summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

(1983), argue that the CSRA affords Sarullo the exclusive remedy for his malicious prosecution claim and that the District Court therefore lacked jurisdiction over his claim for malicious prosecution as it "relate[d] to his employment relationship with the postal service. . . ."

In *Bush,* the Supreme Court held that "the history and structure of the CSRA spoke with sufficient clarity to preclude the creation of a new *Bivens* claim." *Mitchum v. Hurt,* 73 F.3d 30, 35 (3d Cir.1995). In *Mitchum,* we held that the CSRA affords the exclusive remedy for damage claims of federal employees seeking redress for alleged constitutional violations arising out of the employment relationship. We noted that the employment relationship underlying disputes between federal employees and the government implicates the interest of the government as employer and therefore gives rise to " 'special factors counseling hesitation' [that] militate against the creation of a new [*Bivens*] damages remedy." *Mitchum,* 73 F.3d at 34 (quoting *Bush,* 462 U.S. at 377 (quoting *Bivens,* 403 U.S. at 396)). Accordingly, we must at the outset determine whether we have subject matter jurisdiction to resolve the merits of Sarullo's *Bivens* claim for damages based upon the alleged malicious prosecution. *See Rice v. United States Dep't of Alcohol, Tobacco & Firearms,* 68 F.3d 702, 707 (3rd Cir.1995), *overruled on other grounds by Pontarelli v. United States Dep't of the Treasury,* 285 F.3d 216 (3d Cir.2002) (en banc).

In *Schweiker v. Chilicky,* 487 U.S. 412 (1988), the Supreme Court announced a very broad rule, holding that a *Bivens* action for an alleged constitutional tort will not lie

"[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Id.* at 423. We agree with the government that, under *Chilicky,* this is a case arising out of the employment context and that the CSRA therefore provides the full scheme of remedies available to Sarullo. Sarullo allegedly engaged in illegal drug activity at his place of employment during regular business hours. His supervisors, alerted to this possibility, understandably became concerned and launched an internal investigation into these alleged wrongdoings. Sarullo was discharged after the investigation revealed that he was dealing drugs at work.

A commonsense reading of the CSRA and of the jurisprudence it has generated forces us to conclude that measures designed to investigate an employee who is dealing drugs at work are actions arising out of the employment context.[5] True, those same actions could have taken place in a wide variety of places: Sarullo's home, the street corner, a

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5. The CSRA contains a number of lengthy definitions of personnel actions and the circumstances under which they become "prohibited personnel practices," including the requisite motive, most of which are unhelpful here. *See, e.g.,* 5 U.S.C. §§ 2302(a)-(b), 7512. As the Ninth Circuit noted in *Saul v. United States,* 928 F.2d 829 (9th Cir.1991), *Bush* holds squarely that the CSRA prevents federal employees from bringing *Bivens* actions to job-related wrongs and the specification of "covered actions" clearly reflects a congressional intent to extend the CSRA to the kind of decisions that are endemic in the daily dynamics of the employee/employer relationship. We have no doubt that a discharge of an employee is such a personnel action.

local bar. But under the facts of this case, these alleged actions took place at work, and Sarullo was discharged because of his alleged drug dealings at work — not because of alleged illegal activity taking place in the privacy of his own home — or elsewhere — outside of working hours. There is no reasonable explication of the CSRA which would have us decide that dealing drugs at work is not related to the employment context.

This conclusion is supported by the jurisprudence of other circuits. In *Lombardi v. Small Business Administration,* 889 F.2d 959 (10th Cir.1989), the plaintiff, an intern at the Small Business Administration, filed a *Bivens* claim after his termination. The intern sought damages and injunctive relief alleging violation of his constitutional rights by the Small Business Administration and its officials. The Court held that the intern could not pursue a *Bivens* claim because:

> the violations complained of by the Appellant occurred only as a result of the employment relationship with the Small Business Administration. His position as a federal employee is central to his complaints, and it is this employment relationship that the Supreme Court emphasized in *Bush* and its progeny, rather than the nature of the specific violation involved. This Court can find no facts in the case at bar that sufficiently distinguish it from the numerous other cases finding no *Bivens* remedies in similar situations, especially in light of the Supreme Court's clear directive in *Chilicky.*

Id. at 961.

Just as in *Lombardi*, Sarullo's status as a federal employee is central to his complaint, and the CSRA therefore precludes his claim. In addition to the initial bar announced in *Bush v. Lucas* where the CSRA was held to preclude a *Bivens* claim for the abridgment of the plaintiff's First Amendment rights, our sister circuits have found *Bivens* claims to be similarly barred by the CSRA under a number of different circumstances. *See, e.g., Stephens v. Dep't of Health & Human Servs.*, 901 F.2d 1571, 1576-77 (11th Cir.1990) (CSRA held to preclude plaintiff's *Bivens* claims for due process infractions); *Berrios v. Dep't. of the Army*, 884 F.2d 28, 30-33 (1st Cir.1989) (CSRA held to preempt plaintiff's defamation suit against former supervisors).

Sarullo argues that his claim for malicious prosecution does not fall within the scheme of remedies provided by the CSRA and that he is entitled to prosecute a *Bivens* claim because "[n]ot all personnel actions are covered by [the CSRA]. . . . [C]ertain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme." *Bush*, 462 U.S. at 386 n.28. Based on this dicta, Sarullo claims that the investigation initiated against him by his supervisors was not a "personnel action" within the statutory scheme and that the CSRA therefore does not provide a remedy. We disagree.

While it is true that Sarullo's supervisors placed a tape recorder on their informant, an action that bears a similarity to wiretapping, and that such an activity did not itself constitute a "personnel action" within the CSRA's statutory scheme, Sarullo did not prosecute a statutory or Fourth

Amendment damages claim because of the interception, but rather a claim for malicious prosecution. Under the facts of this case, the attempted tape recording was one of the actions that Sarullo's supervisors (clumsily) took during the investigation they conducted to determine whether Sarullo was engaged in illegal drug sales at the work place, but it was certainly not the central factor that led to his arrest and prosecution. As we have noted, no conversations relating to drugs were actually recorded during these alleged drug transactions. Despite the failed recording, Sarullo was nevertheless indicted and tried for possession and distribution of a controlled substance. Thus, although the recording itself does not qualify as a "personnel action" within the statutory scheme implemented by the CSRA, the recording constitutes only a small part of the overall investigation, and a botched one at that.

Because Sarullo's claim for malicious prosecution clearly arises in the employment context, in light of the broad rule of *Chilicky* and its progeny, we conclude that the CSRA provides him with his sole remedy. For these reasons, we hold that the District Court lacked subject matter jurisdiction to hear Sarullo's *Bivens* claim as such a claim was barred by the comprehensive statutory scheme provided in the CSRA, and should have dismissed the *Bivens* claim for lack of subject matter jurisdiction.

B. Discrimination

In addition to his malicious prosecution claim, Sarullo alleges employment discrimination based on his race, and age, as well as illegal retaliation for his prior EEO complaint.

However, Sarullo has not established a *prima facie* case of discrimination or retaliation and the District Court therefore properly granted summary judgment on these claims.

The familiar *McDonnell Douglas* burden shifting analysis applies to Sarullo's claims of discrimination under both Title VII and the ADEA. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Stanziale v. Jargowsky*, 200 F.3d 101, 105 (3d Cir.2000). Accordingly, Sarullo bears the initial burden of establishing a *prima facie* case by a preponderance of the evidence. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).[6] When a plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. If the defendant meets this burden, the presumption of discriminatory action raised by the *prima facie* case is rebutted. *Tex. Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The plaintiff then must establish by a preponderance of the evidence that the employer's proffered reasons were merely a pretext for discrimination, and not the real motivation for the unfavorable job action. *Id.* at 253; *McDonnell Douglas*, 411 U.S. at 804.

The existence of a *prima facie* case of employment discrimination is a question of law that must be decided by

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6. The requirements for a *prima facie* case of Title VII race discrimination and age discrimination under the ADEA are substantially the same. *See Stanziale*, 200 F.3d at 105. The only real distinction is that for age discrimination, an individual is a member of a protected class if he is forty years of age or older. *See* 29 U.S.C. § 631.

the Court. It requires a showing that: (1) the plaintiff belongs to a protected class; (2) he/she was qualified for the position; (3) he/she was subject to an adverse employment action despite being qualified; and (4) under circumstances that raise an inference of discriminatory action, the employer continued to seek out individuals with qualifications similar to the plaintiff's to fill the position. *McDonnell Douglas,* 411 U.S. at 802; *Pivirotto v. Innovative Sys., Inc.,* 191 F.3d 344, 348 n.1, 352, 356 (3d Cir.1999).[7] However, the *prima facie* test remains flexible and must be tailored to fit the specific context in which it is applied. *Geraci v. Moody-Tottrup, Int'l, Inc.,* 82 F.3d 578, 581 (3d Cir.1996).

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7. The facts necessary to establish a *prima facie* case of discrimination under Title VII vary depending on the particular circumstances of each case. *McDonnell Douglas,* 411 U.S. at 802 n.13. The defendants suggest that the fourth element requires a showing that "other similarly situated employees outside [Sarullo's] protected class were more favorably treated under similar circumstances." While a number of our decisions suggest such a showing was required in the past, *see, e.g., Lawrence v. Nat'l. Westminster Bank,* 98 F.3d 61, 68 (3d Cir.1996) (plaintiff must prove he/she was replaced by person outside protected class to create an inference of discrimination), that is not the current law in this or the majority of the circuits. *See Pivirotto,* 191 F.3d at 354. In *Pivirotto,* we explicitly rejected a requirement that a plaintiff prove he was replaced by someone outside the protected class to prove a *prima facie* case of discrimination. 191 F.3d at 352. We require only that the plaintiff show that the employer continued to seek out individuals with similar qualifications after refusing to rehire the plaintiff under circumstances that raise an inference of unlawful discrimination. *See id.* ("Nowhere did the [Supreme Court] describe the fourth element as hiring of (or, by implication, replacement by) a person outside the plaintiff's class.")

Appendix A

The first three elements of Sarullo's *prima facie* case are not disputed. He is of Native American ancestry, and more than forty years old. He is therefore a member of a protected class under Title VII (his ethnicity) and the ADEA (his age), and his qualifications are not in dispute.[8] He suffered an adverse employment action when he was terminated and not rehired. However, Sarullo can not establish that USPS's failure to rehire him raises an inference of discriminatory animus. The "central focus" of the *prima facie* case "is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.' " 191 F.3d at 352 (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977)). Sarullo's evidence of race discrimination consists solely of his own assertion that he was not rehired because he is Native American. He attempts to support that allegation using his own deposition and affidavits suggesting that most of his coworkers and supervisors knew that he was Native American and some of them called him derogatory nicknames referencing his Native American heritage. However, he has not claimed that employees who are not Native American have been rehired after having criminal charges dismissed. Although he need not establish that precise kind of disparate treatment to establish a claim of discrimination, he must establish some causal nexus between his membership in a protected class and the decision to not rehire him.

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8. In 1989 and 1990, Sarullo received a number of disciplinary letters from the USPS, two of them in lieu of seven-day suspensions, for failure to follow official instructions and for working in an unsafe manner. Neither of these past disciplinary actions lead to the inference that he was unqualified for his position.

In addition, USPS suggests that Sarullo does not meet the second prong of the test because he was terminated for cause (his arrest and grand jury indictment for possession and distribution of a controlled dangerous substance). We agree. Sarullo's drug activity fatally undermines his suggestion that USPS's actions raise the inference of discrimination necessary to his *prima facie* case.

Moreover, USPS offered uncontradicted evidence that William Brown, the Manager of the Human Resources Department for the Northern New Jersey District, independently decided that Sarullo was not entitled to reinstatement. While Sarullo alleges that his supervisors and coworkers knew of his Native American ancestry, those individuals were not involved in the decision to deny reinstatement. Sarullo has provided no evidence to rebut Brown's affidavit stating that when he denied Sarullo's reinstatement he was unaware of Sarullo's "race, color, national origin, age, or prior EEO activity" or that Sarullo had made allegations of name calling and improper language in the workplace. Furthermore, nothing here supports an inference that Brown heard of Sarullo's Native American heritage through an office "grapevine." Brown's office was located in Newark, many miles from the South Plainfield facility.

It is undisputed that Brown was unaware of any ethnic name-calling,[9] and there is no evidence that he knew Sarullo's

9. Sarullo claims that Wyatt and Spielman knew of the alleged name-calling as well as of his "age, race, national origin, current grievances and complaints and prior EEO activity." Sarullo makes no similar claim with respect to Brown's knowledge.

"race, color, national origin, age or prior EEO activity." Brown simply followed a USPS policy of denying "reemployment to former employees who had been removed from their position for cause." App. at 636a. Sarullo's attempt to state a cause of action against Brown is therefore meritless.

Sarullo's "evidence" of age discrimination is also speculative. It consists solely of his claim that USPS has hired nine younger employees since his termination. Even assuming *arguendo* that is true, it does not raise an inference that Sarullo's age was a factor in USPS refusing to rehire him. Sarullo fails to offer anything to counter Brown's testimony that he (Brown) did not know Sarullo's age. Although an employee's physical appearance might suggest that he/she is more than forty years of age, nothing on this record suggests Sarullo's appearance conveys knowledge that he is over forty, and Sarullo has not alleged the contrary. Absent knowledge of Sarullo's age, Brown's decision not to reinstate him does not raise an inference of age discrimination.

Moreover, even if Sarullo could establish that his age was known by the relevant decision makers at USPS, he would not automatically prevail. Rather, as explained above, the burden would simply shift to USPS to offer a non discriminatory explanation for its failure to rehire him. USPS would have to " 'clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact,* would support a finding that unlawful discrimination was not the cause of the employment

action." *St. Mary's Honor Center,* 509 U.S. at 507 (quoting *Burdine,* 450 U.S. at 254-55 & n.3) (emphasis in original).[10]

Sarullo does not dispute that William Brown was the appropriate person to decide if he should be reinstated. Brown concluded that reinstating an employee who had been terminated because of an arrest for selling drugs inside a post office facility was not in the best interest of USPS even though the criminal charges were subsequently dismissed following a mistrial. It is hard to find fault with that rationale, and nothing on this record raises doubts about his true motivation.

Sarullo must produce sufficient evidence to allow a reasonable fact finder to conclude that the proffered reasons for not rehiring him are a pretext for illegal discrimination or retaliation. He may meet this burden and defeat a motion for summary judgment by providing evidence that would allow a fact finder reasonably to "(1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause of the employer's action." *Jones v. Sch. Dist. of Phila.,* 198 F.3d 403, 413 (3d Cir.1999) (quoting *Fuentes v. Perskie,* 32 F.3d 759, 764 (3d Cir.1994); *Sheridan v. E.I. DuPont de Nemours & Co.,* 100 F.3d 1061, 1067 (3d Cir.1996)).

Sarullo can accomplish this by showing that the defendants' proffered reasons are weak, incoherent,

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10. Within the *McDonnell Douglas* burden-shifting framework, the defendant only has the burden of production because the burden of proof in a discrimination claim remains with the plaintiff. *Burdine,* 450 U.S. at 253.

implausible, or so inconsistent that "a reasonable factfinder could rationally find them unworthy of credence." *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108-09 (3d Cir.1997). He can also meet this burden with evidence that "the employer's articulated reason was not merely wrong, but that it was 'so plainly wrong that it could not have been the employer's real reason.' " *Jones,* 198 F.3d at 413 (quoting *Keller,* 130 F.3d at 1109).

Sarullo has not produced sufficient evidence to refute the defendants' explanation of why he was not rehired. He alleges that his supervisors and coworkers were out "to get him." He attempts to explain Brown's independent decision against reinstatement by arguing that USPS had erected a "glass wall" between Brown and the rest of Sarullo's former supervisors and coworkers. However, no evidence is offered to contradict Brown's statement that he made the reinstatement decision without knowledge of Sarullo's ethnicity or age. Sarullo merely claims that the proffered explanation for not rehiring him is a "sham." Absent countervailing proof, that is nothing more than Sarullo's personal view of his employer's explanation and falls far short of establishing pretext. *See Jones,* 198 F.3d at 414. Sarullo's response is thus insufficient to defeat a motion for summary judgment.

C. Retaliation

In 1989, Sarullo entered into an EEO settlement with Steve Kubala who was then his supervisor at USPS. Sarullo had claimed that Kubala had discriminated against him and harassed him based upon race. Sarullo now argues that the

decision to not reinstate him following dismissal of the criminal charges was motivated, at least in part, by a desire to retaliate for having filed an EEOC complaint against USPS in the past.

A plaintiff alleging that an unfavorable job action is based upon an illegal retaliatory motive in violation of Title VII must first establish that "(1) he was engaged in protected activity; (2) he was [subject to an adverse job action] subsequent to or contemporaneously with such activity; and (3) there is a causal link between the protected activity and the [subsequent adverse job action]." *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir.1997).

Sarullo can establish the first prong of this test because he engaged in protected activity in 1989. The events giving rise to the present case occurred in 1992. He also satisfies the second part of the inquiry as USPS obviously failed to rehire him after that 1989 complaint.[11] However, Sarullo's attempt to establish a *prima facie* case of retaliation fails because there is nothing in the record to suggest a relationship between the decision to not rehire and the prior EEOC activity. As noted above, it is undisputed that USPS has a policy against rehiring an employee who is terminated with cause and nothing here suggests that the policy was enforced

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11. The fact that the prior complaint was filed in 1989 weakens Sarullo's claim, but is not fatal to it. We have held that " 'the mere passage of time is not legally conclusive proof against retaliation,' " particularly when the plaintiff is subject to a continuous pattern of harassment following the protected activity. *Woodson*, 109 F.3d at 920 (quoting *Robinson v. SEPTA*, 982 F.3d 892, 894 (3d Cir.1993)). Sarullo does allege a continuing pattern of harassment.

so inconsistently as to support an inference that it was invoked here merely as a pretext for retaliation. We conclude that no reasonable fact finder could conclude anything other than that USPS would have made exactly the same decision regarding Sarullo's rehiring if he had never filed an EEOC complaint. We can not accept his argument that the record here would allow a reasonable fact finder to conclude that the decision not to rehire him was somehow tainted by EEOC activity. Moroever, Sarullo has provided no evidence to rebut Brown's declaration that he was unaware of Sarullo's prior EEO activity when he made his decision not to reinstate Sarullo. Thus, the District Court properly granted summary judgment. *See Jones,* 198 F.3d at 415.

IV. CONCLUSION

For the reasons set forth above, we will affirm the District Court's grant of summary judgment in favor of the defendants with respect to the discrimination and retaliation claims. The *Bivens* claim will be dismissed for lack of subject matter jurisdiction.[12]

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12. Sarullo also argues that the District Court abused its discretion in refusing to allow him to amend his complaint under Fed.R.Civ.P. 15(a). However, the District Court explained that such an amendment would be futile and properly exercised its discretion to deny the amendment. We agree. *See In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1434 (3rd Cir.1997). Accordingly, the Court did not abuse its discretion in denying the attempt to amend this complaint.

Sarullo also complains that the District Court erred in granting summary judgment even though discovery was not yet complete. (Cont'd)

Appendix A

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(Cont'd)
We assume that this refers to the Court's denial of his motion to compel discovery under Fed.R.Civ.P. 37(a). However, the District Court explained why that motion was improper, and we affirm the Court's decision substantially for the reasons set forth by the District Court.

Finally, we also deny the government's motion to dismiss Sarullo's appeal because the Notice of Appeal failed to specify the orders Sarullo was appealing. Under *Drinkwater v. Union Carbide, Corp.* 904 F.2d 853, 858 (3d Cir.1990), we may exercise jurisdiction of unspecified prior orders related to a final order.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED DECEMBER 19, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-4203

PATRICK SARULLO,

Appellant

v.

UNITED STATES POSTAL SERVICE; MARVIN T. RUNYON, POSTMASTER;* WILLIAM BROWN, MANAGER HUMAN RESOURCES UNITED STATES POSTAL SERVICE; THOMAS L. MODAFFERI; MARTIN C. DUBINSKI; BARBARA HIGGINS, POSTAL INSPECTORS; LINDA WYATT, POSTMASTER; JEFFREY KERKEN, SUPERVISOR; MARTIN SPIELMAN, SUPERVISOR; WILMA MEDERO

On Appeal for the United States District Court
for the District of New Jersey
(D.C., No. 96-cv-03241)
District Judge: Honorable Nicholas H. Politan

Argued: September 18, 2002

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* William Henderson is substituted for his predecessor, Marvin Runyon, as Postmaster General of the United States Postal Service, pursuant to Fed. R. App. P. 43(c)(2).

Appendix B

Before: BECKER, *Chief Judge*,** SCIRICA*** and McKEE, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 18, 2002.

On consideration whereof, it is ORDERED and ADJUDGED by this Court that the judgment of the District Court entered October 4, 2001, granting summary judgment in favor of the defendants be affirmed with respect to the discrimination and retaliation claims. The *Bivens* claim will be dismissed for lack of subject matter jurisdiction. All in accordance with the foregoing opinion.

Costs taxed against appellant.

ATTEST:

s/ Kathleen Brown
Acting Clerk

Dated: December 19, 2003

** Judge Becker's term as Chief Judge ended on May 4, 2003.

*** Judge Scirica became Chief Judge on May 4, 2003.

APPENDIX C — AMENDED LETTER RE: *PATRICK SARULLO v. U.S. POSTAL SERVICE ET AL.* OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED OCTOBER 1, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS
NICHOLAS H. POLITAN
DISTRICT JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S.
COURTHOUSE
50 WALNUT ST. ROOM 5076
P.O. BOX 999
NEWARK, N.J. 07101-0999

October 1, 2001

THE ORIGINAL OF THIS AMENDED LETTER OPINION AND ORDER IS ON FILE WITH THE CLERK OF THE COURT

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490 Somerset Street
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Appendix C

Eric Tunis, Esq.
20 Northfield Avenue
West Orange, NJ 07052
Attorney for Defendant
Linda Wyatt

Re: Patrick Sarullo
v. U.S. Postal Service, et al.
Civil Action No. 96-3241 (NHP)

Dear Counsel:

This matter comes before the Court on remand from the Court of Appeals for the Third Circuit. For the following reasons, plaintiff Patrick Sarullo's Complaint is **DISMISSED** as to defendant Wilma Medero and this case is **CLOSED**.

BACKGROUND

The circumstances surrounding this case are set forth in this Court's original Letter Opinion dated October 4, 2000. In that Letter Opinion, this Court granted the defendants' motion for summary judgment and dismissed plaintiff Patrick Sarullo's Complaint in its entirety as to "all defendants," although it did not include the name of defendant Wilma Medero.

Accordingly, for the reasons expressed in this Court's Letter Opinion dated October 4, 2000, plaintiff Patrick Sarullo's Complaint is **DISMISSED** as to defendant Wilma Medero.

Appendix C

CONCLUSION

For the foregoing reasons, plaintiff Patrick Sarullo's Complaint is **DISMISSED** as to defendant Wilma Medero. This case is now **CLOSED**.

IT IS SO ORDERED:

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

APPENDIX D — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 28, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00-3673

PATRICK SARULLO,

Appellant

v.

UNITED STATES POSTAL SERVICE; MARVIN T. RUNYON, POSTMASTER; WILLIAM BROWN, MANAGER HUMAN RESOURCES UNITED STATES POSTAL SERVICE; THOMAS L. MODAFERRI; MARTIN C. DUBINSKI; BARBARA HIGGINS, POSTAL INSPECTORS; LINDA WYATT, POSTMASTER; JEFFREY KERKEN, SUPERVISOR; MARTIN SPIELMAN, SUPERVISOR; WILMA MEDERO

On Appeal from the United States District Court
For the District of New Jersey
(D.C. Civ. No. 96-cv-3241)
District Judge: Honorable Nicholas H. Politan

Submitted under Third Circuit LAR 34.1(a)
Tuesday, September 25, 2001

Appendix D

Before: ROTH, WEIS and GARTH, *Circuit Judges*

(Filed: September 28, 2001)

MEMORANDUM OPINION

Garth, *Circuit Judge:*

Because all parties are familiar with the relevant facts, we will not recount them here. The issues on appeal are whether: (1) the District Court erred in granting summary judgment to the defendants on plaintiff's claims of employment discrimination; (2) the District Court erred in granting summary judgment to the defendants on plaintiff's claims of malicious prosecution; and (3) the District Court abused its discretion in denying plaintiff's motion to amend his complaint.

After having reviewed the arguments advanced by the parties' as well as the record in this case, we have determined that one of the defendants, Wilma Medero ("Medero"), was not dismissed from this action. Without a final disposition on Medero, the judgments of the District Court are not "final" within the meaning of 28 U.S.C. § 1291, and we lack appellate jurisdiction to decide this appeal.

In his opinion dated April 2, 1998, Judge Bissell specifically noted that the government had previously filed a motion to dismiss on behalf of Medero, and that "[a]t present, [Medero] is a party to this case whom the U.S. Attorney has already purported to represent." *Sarullo v. United States Postal Service,* No. 96-3241, slip. op. at 16-17

(D.N.J. Apr. 2, 1998). Moreover, the District Court ruled that "[a]ny application to dismiss on behalf of Medero will have to be filed separately." *Id.*[1] Unfortunately, after the reassignment of this case to Judge Politan in May 2000, Judge Bissell's ruling concerning Medero was overlooked, and when Judge Politan entered judgment for all defendants on October 4, 2000, he did not name Medero. *Sarullo v. United States Postal Service.* No. 96-3241, Final Order at 1-2 (D.N.J. Oct. 4, 2000).

Because we cannot exercise jurisdiction over a non-final order – that is, where a final disposition has not been had of all parties in the action – we cannot review Sarullo's arguments in support of his causes of action (although they all appear to be without merit).

We will therefore dismiss the appeal for want of appellate jurisdiction and remand this case to the District Court, which may desire to vacate its earlier order permitting the Assistant United States Attorney to withdraw as Medero's counsel so that an appropriate motion may be made with respect to Medero. The District Court may, of course, in its sole discretion take this or any other of the steps it deems advisable to dispose of the claims against Medero inasmuch as our lack of appellate jurisdiction does not authorize us to do anything other than dismiss the appeal and remand. *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 379 (1981).

TO THE CLERK:

Please file the foregoing opinion.

/s/ Leonard I. Garth
Circuit Judge

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3673

PATRICK SARULLO,

Appellant

v.

UNITED STATES POSTAL SERVICE; MARVIN T. RUNYON, POSTMASTER; WILLIAM BROWN, MANAGER HUMAN RESOURCES UNITED STATES POSTAL SERVICE; THOMAS L. MODAFERRI; MARTIN C. DUBINSKI; BARBARA HIGGINS, POSTAL INSPECTORS; LINDA WYATT, POSTMASTER; JEFFREY KERKEN, SUPERVISOR; MARTIN SPIELMAN, SUPERVISOR; WILMA MEDERO

On Appeal from the United States District Court
For the District of New Jersey
(D.C. Civ. No. 96-cv-3241)
District Judge: Honorable Nicholas H. Politan

Submitted under Third Circuit LAR 34.1(a)
Tuesday, September 25, 2001

Before: ROTH, WEIS and GARTH, *Circuit Judges*

Appendix D

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a) on September 25, 2001. On consideration whereof, it is now here

ADJUDGED AND ORDERED from the Order of the District Court dated October 4, 2000 be and is hereby dismissed for want of appellate jurisdiction.

Each party shall bear its own costs.

ATTEST:

s/ Marcia M. Waldron
Clerk

Dated: 28 September 2001

Certified as a true copy and issued in lieu of a formal mandate on November 19, 2001

Teste: Marcia M. Waldron

Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX E — LETTER RE: *PATRICK SARULLO V. U.S. POSTAL SERVICE ET AL.* OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED OCTOBER 4, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS
Nicholas H. Politan
DISTRICT JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S.
COURTHOUSE
50 WALNUT ST. ROOM 5076
P.O. BOX 999
NEWARK, N.J. 07101-0999

October 4, 2000

THE ORIGINAL OF THIS LETTER OPINION AND ORDER IS ON FILE WITH THE CLERK OF THE COURT

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Appendix E

Eric Tunis, Esq.
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Attorney for Defendant
Linda Wyatt

Re: Patrick Sarullo
v. U.S. Postal Service, et al
Civil Action No. 96-3241 (NHP)

Dear Counsel:

This matter comes before the Court on the motion of defendants, Postmaster General William Henderson of the United States Postal Service, Linda Wyatt, Martin Spielman, Jeffrey Kerken, Barbara Higgins, Martin C. Dubinski, and Thomas L. Modafferi for summary judgment. Plaintiff Patrick Sarullo moves for leave to file an Amended Complaint. The Court heard oral argument on September 18, 2000. For the reasons explained herein, the defendants' motion for summary judgment is hereby **GRANTED**. Accordingly, plaintiff Patrick Sarullo's Complaint is **DISMISSED** and this case is **CLOSED.**

BACKGROUND

Plaintiff, Patrick Sarullo ("plaintiff") brought this civil rights action against various defendants, alleging a vast conspiracy to violate several of his constitutional rights and to discriminate against him based on his race, color, national

origin and age.[1] The particular defendants moving for summary judgment in this matter include Postmaster General William Henderson ("Postmaster General") of the United States Postal Service ("USPS"), Linda Wyatt (""Wyatt"), Martin Spielman ("Spielman"), Jeffrey Kerken ("Kerken"), Barbara Higgins ("Higgins"), Martin C. Dubinski ("Dubinski"), and Thomas L. Modafferi ("Modaferri").[2] The circumstances surrounding this case are set forth in Judge Bissell's Opinion dated December 18, 1997. Suffice it to say that plaintiff specifically claims violations of Title VII of the Civil Rights Act of 164, 42 U.S.C. § 2000e *et seq*. ("Title VII"); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626 ("ADEA"); the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*
("NJLAD"); and the common law of the State of New Jersey. In sum, plaintiff alleges that defendant Postmaster General William Henderson and the USPS discriminated against him on the basis of his race, color, national origin and age, and in retaliation for his past Equal Employment opportunity grievances in violation of Title VII and the ADEA. Plaintiff also asserts that the remaining individual Postal defendants

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1. This matter was transferred from District Court Judge Bissell to the undersigned Judge on May 24, 2000.

2. Defendant National Association of Letter Carriers, Branch 38, was dismissed from this case by Stipulation and Order on July 22, 1997. Defendants Detective Michael Lane and the South Plainfield Police Department were dismissed from this case by Stipulation of Dismissal on January 16, 1998. Defendants Christopher L.C. Kuberiet and.Middlesex County Prosecutor Robert Gluck were dismissed from the case by Stipulation of Dismissal on February 10, 1998.

defamed him and caused his false arrest and malicious prosecution.

In a December 18, 1997 Opinion and Order, Judge Bissell dismissed the following claims: (1) plaintiff's Title VII and ADEA claims against all defendants except the Postmaster General (who was at that time Marvin T. Runyon, Jr:); (2) plaintiff's *Bivens* claim as to federal employment discrimination: and (3) plaintiff's *Bivens* claim as to defamation and/or false arrest. *See Sarullo v. United States Postal Service, et al.*, No. 96-3241, slip op. (D.N.J. Dec. 18, 1997) (Bissell, J.). Accordingly, the only remaining claims which this Court must address are plaintiff's Title VII and ADEA Claims against the Postmaster General and his malicious prosecution claim against *the* individual Postal defendants.[3]

DISCUSSION

I. *Summary Judgment Standard*

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment may be granted

3. In an April 2, 1998 Opinion and Order, Judge Bissell denied in part and granted in part the defendants' motion for reconsideration. The motion was granted in that Judge Bissell dismissed defendant William Brown from the case.

against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, for which that party will bear the ultimate burden of proof at trial. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

The moving party bears the initial burden of identifying evidence that demonstrates the absence of a genuine issue of material fact. *See id.* at 323. Whether a fact is material is determined by the applicable substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue involving a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1219 n.3 (3d Cir. 1988), *cert. denied,* 490 U.S. 1098 (1989). Once that burden has been met, the nonmoving party must set forth "specific facts showing that there is a genuine issue for trial," or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In determining whether any genuine issues of material fact exist, the Court must resolve "all inferences, doubts, and issues of credibility . . . . against the moving party." *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983) (citing *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972)).

Further, the nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*; 475 U.S. at 586. An issue is "material" only if the dispute "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248 (1986). To defeat "a properly supported summary judgment motion, the party opposing it must present sufficient evidence for a reasonable jury to find in its favor." *Groman v. Tp. of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995). Accordingly, the party opposing summary judgment may not merely restate the allegations of its pleadings. *See Farmer v. Carlson*, 685 F.Supp. 1335, 1339 (M.D.Pa. 1988). Moreover, a party cannot rely upon self-serving conclusions, unsupported by specific facts in the record. *See Celotex*, 477 U.S. at 322-23. If the record, as a whole, cannot "lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

II. *Title VII Claims*

Plaintiff asserts that the Postmaster General of the USPS did not rehire him on account of his American Indian ethnicity and in retaliation for his prior Equal Employment Opportunity ("EEO") activities. Each of these claims will be addressed in turn.

A. Refusal to Rehire Based On Race

Plaintiff's failure to rehire claim based upon race discrimination under Title VII requires application of the familiar burden-shifting framework the Supreme Court articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See Simpson v. Kaye Jewelers, Div. Of Serlin, Inc.*, 142 F.3d 639, 643-44 (3d Cir. 1998). Under *McDonnell Douglas's* burden-shifting analysis, the plaintiff must first establish a *prima facie* case of discrimination. *See Stanziale v. Jargowsky*, 200 F.3d 101, 105 (3d Cir. 2000);

Jones v. School Dist. of Philadelphia, 198 F.3d 403, 410 (3d Cir. 1999). If the plaintiff succeeds in establishing a *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Jones*, 198 F.3d at 410 (quoting *McDonnell Douglas*, 411 U.S. at 802); *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 497 n.11 (3d Cir. 1999). Should the defendant carry this burden, the plaintiff then must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (citations omitted). While the burden of production may shift, "(t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253, 1094. *See also Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994).

Whether a *prima facie* case has been made out by a plaintiff is a legal issue for the Court to determine. *See Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 348 n.1 (3d Cir. 1999). To prove a *prima facie* case, the plaintiff must establish each of the following: (1) he belongs to a protected class; (2) he applied for and was qualified for the position; (3) he did not receive the position; and (4) he was not rehired under circumstances which raise an inference that the decision was based on an illegal discriminatory criterion. *See Pivirotto*; 191 F.3d at 357 (quoting *Waldron v. SL Indus., Inc.*, 56 F.3d 491, 494 (3d Cir. 1995)). Plaintiff need not show that he was replaced by someone outside the protected class to meet the *prima facie* burden. *See id.* at 356-57 (citing

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311-12, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996)). Reiterating prior Supreme Court precedent, the *Pivirotto* court emphasized that the "central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Id.* at 352 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978)).

Plaintiff has met the first two prongs of the *prima facie* case. He is of American Indian descent and had experience as a mail carrier.[4] Plaintiff cannot, however, point to any evidence which creates an inference that the adverse employment decision was based on his race. There exists no evidence that similarly situated white and/or non-American Indian employees were treated more favorably than plaintiff. The only credible evidence plaintiff provides is that he is an American Indian male, that his superiors had access to his file and therefore could have known of his race, and that he was not rehired. Because plaintiff cannot make out a *prima facie* case of discrimination, summary judgment in favor of defendant is appropriate.

Even assuming plaintiff established a *prima facie* case, defendant has proffered a legitimate, nondiscriminatory

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4. It is questionable whether plaintiff even satisfies the requirement that he was qualified for the job. Here, where an employee is indicted and brought to trial for.selling drugs while working, it is arguable that.the employer would consider such an employee "unqualified." However, viewing the evidence in a light most favorable to plaintiff, the Court will assume that plaintiff was qualified for the position.

reason for not rehiring him. Defendant has met its burden by claiming that it did not rehire plaintiff because he was indicted by a grand jury for selling narcotics. Indeed, defendant's legitimate reason – the grand jury indictment and subsequent criminal trial – suffices to discharge defendant's burden of proof at this stage and rebut plaintiff's *prima facie* case. *See McDonnell Douglas,* 411 U.S. at 803. Plaintiff was originally terminated for cause as a result of the indictment. By letter dated April 7, 1995, William Brown, District Manager of Human Resources, notified plaintiff of his decision not to rehire him, based on the USPS's policy to refuse employment to persons who were removed for cause.

To survive a motion for summary judgment .when a defendant offers a legitimate reason for its employment action in a "pretext" employment discrimination case, the plaintiff generally must submit evidence which: "(1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or (2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." *Fuentes*, 32 F.3d at 762. In assessing the quantum of evidence plaintiff is required to present, the evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered, non-discriminatory reasons are a pretext. *See id.* at 764.

Here, plaintiff is unable to throw sufficient doubt on defendant's proffered legitimate reason. Plaintiff's unsubstantiated assertion of a vast conspiracy in which

various individual defendants-were "out to get him" rings hollow. Moreover, his self-serving allegations of discriminatory remarks and the defendant's knowledge of his ethnicity cannot carry the day. In fact, defendant has submitted evidence that William Brown, who made the decision not to rehire plaintiff, did not know of plaintiff's race. The record is bereft of any evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the defendant's articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the defendant's action. *See Fuentes*, 32 F.3d at 763.

The Postmaster General is more than justified to part ways with an employee who was – rightly or wrongly – indicted by a grand jury for dealing narcotics. Indeed, illegal actions would be grounds for termination. *See Green v. McDonnell Douglas, Corp.*, 463 F.2d. 337, 341 (8th Cir. 1972) ("[W]e find no suggestion that [Title VII] protection extends to activities which run afoul of the law."), *rev'd on other grounds, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). That plaintiff's trial resulted in a hung jury is of no moment. This fact proved neither plaintiff's guilt nor his innocence. In fact, plaintiff's guilt or innocence matters not. Even if the USPS was mistaken in believing plaintiff committed a crime, a wrong or mistaken decision by an employer is not actionable. *See Fuentes*, 32 F.3d at 765. In short, whether plaintiff was innocent or not, the principle downfall in his argument is that he has provided no credible evidence that a discriminatory animus motivated his employer's decision not to rehire him. Accordingly, summary judgment in favor of the Postmaster General is appropriate.

Appendix E

B. Retaliatory Discharge

To establish a *prima facie* case of retaliatory discharge, a plaintiff must show that: (1) he engaged in a protected activity; (2) the employer took adverse employment action after or contemporaneous with that activity; and (3) there was a causal connection between the protected activity and the employer's adverse action. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299, 1300 (3d Cir. 1997); *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 725, 107 L.Ed.2d 745 (1990) (citation omitted). Plaintiff sought EEO counseling and settled an EEO matter in 1989. This is protected activity under Title VII. *See Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir. 1995). The same burdenshifting analysis is applied as that used for a failure to rehire claim.

Here, plaintiff's claim fails for much the same reasons explained above. Although plaintiff sought EEO counseling and settled an EEO matter in 1989, he cannot establish a *prima facie* case because the defendant's decision not to rehire him was not contemporaneous with his protected activity. The adverse employment decision occurred six years later, in 1995. For much the same reason, there is no causal or temporal connection between the protected activity and the decision not to rehire. Therefore, plaintiff cannot satisfy the second and third prongs of the *prima facie* requirements, and defendant Postmaster General is entitled to summary judgment on this claim.

Even assuming *arguendo* that plaintiff established a *prima faci* case, he is unable to cast doubt on defendant's

proffered legitimate, nondiscriminatory reason. As already mentioned, defendant has shown that it declined to rehire plaintiff because of the grand jury indictment and subsequent criminal proceedings, thereby meeting its burden. In fact, defendant has submitted evidence that William Brown, who made the decision not to rehire plaintiff, did not know of plaintiff's prior. EEO activities. In rebuttal, plaintiff has proffered only the bald and conclusory allegation that he was not rehired because of his prior EEO activities. Plaintiff failed to present any credible evidence which would permit a factfinder to reasonably conclude that the defendant's reason was a fabrication, nor is there evidence which would allow a factfinder to infer that discrimination was more likely than not a motivating cause. Moreover, as the Court has explained, illegal actions may be grounds for termination. *See Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 341 (8th Cir. 1972), *rev'd* on *other grounds*; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Therefore, defendant Postmaster General is entitled to summary judgment on plaintiff's retaliatory discharge claim.

III. *Age Discrimination Under the ADEA*

The *McDonnell Douglas* burden-shifting procedure also governs claims under the ADEA, albeit in a slightly modified form. *See Stanziale*, 200 F.3d at 105: *Showalter v. Univ. of Pittsburgh Medical Center*, 190 F.3d 231, 234 (3d Cir. 1999). To prove a *prima facie* ADEA case, plaintiff must show that: (1) he was a member of the protected class, *i.e., was* forty years of age or older (*see* 29 U.S.C. § 631(a)), (2) he was discharged (or not rehired), (3) he was qualified for the job, and (4) he was not rehired under circumstances which raise

an inference that the decision was based on age. *See Pivirotto*, 191 F.3d at 357 (quoting *Waldron v. SL Indus., Inc.*, 56 F.3d 491, 494 (3d Cir. 1995)); *Horvath v. Rimtec Corp.*, 102 F.Supp.2d 219, 232 (D.N.J. 2000). Plaintiff need not show that he was replaced by someone outside the protected class to meet the *prima facie* burden. *See Pivirotto*, 191 F.3d at 356-57 (citing *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-12, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996)). The burden then rebounds to the defendant to show the it had a legitimate, nondiscriminatory reason for the adverse employment action. *See Stanziale*, 200 F.3d at 105 (citing cases). If a defendant satisfies this burden, a plaintiff may then survive summary judgment by submitting evidence from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. *See id.*

Plaintiff has met the first two elements of the *prima facie* case. He was forty-four years of age at the time his application for reinstatement was denied.[5] Plaintiff cannot, however, make out a *prima facie* case because there is no evidence which raises an inference that the adverse employment decision was based on his age. There exists not even a hint of age discrimination in the record.

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5. As to the third element, defendant argues that plaintiff was not qualified for the job by virtue of the grand jury indictment and subsequent criminal proceedings. While this may or may not be true, the Court will view the evidence in a light most favorable to plaintiff and assume for purposes of this motion that he was qualified for the position.

Even if plaintiff could prove a *prima facie* case, defendant has proffered a legitimate, nondiscriminatory reason for not rehiring plaintiff. As demonstrated above, plaintiff has not submitted evidence from which a factfinder could reasonably disbelieve defendant's legitimate reason or believe that plaintiff's age was more likely than not a motivating or determinative cause of the employer's action Plaintiff has not established that he was replaced by, or refused the position in favor of, someone younger in age than him. In fact, defendant has submitted evidence that William Brown, who made the decision not to rehire plaintiff, did not know his age. Plaintiff offers only unsubstantiated allegations in rebuttal. Therefore, defendant Postmaster General is entitled to summary judgment on the ADEA claim.

IV. Malicious Prosecution

Plaintiff asserts a *Bivens* suit for malicious prosecution against the individual Postal defendants, Wyatt, Spielman, Kerken, Higgins, Dubinski, and Modafferi.

Courts have granted qualified immunity from civil liability to public officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Even law enforcement officers who reasonably but mistakenly believe that probable cause is present are entitled to qualified immunity. *See Anderson v. Creighton*; 483 U.S. 635, 641, 107 S.Ct. 3034, 3039-40, 97 L.Ed.2d 523 (1987) (citing *Malley v. Briggs*, 475 U.S. 335, 344-45, 106 S.Ct. 1092,

1097-98, 89 L.Ed.2d 271 (1986)). In effect, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

In this case Modaferri received a tip that a mail carrier named Pat from the South Plainfield Post Office was dealing drugs. Modaferri, and his assisting inspectors, Higgins and Dubinski, began an investigation to confirm this information. There is no evidence that the initiation of the investigation into plaintiff "violated clearly established statutory or constitutional rights which a reasonable person would have known." In fact, it was Modaferri's duty to initiate the investigation, and he would have been derelict in his duties if he had not started an investigation.[6]

In addition, the use of confidential informants by law enforcement to conduct "controlled" drug transactions whereby the alleged drug dealer could be "caught in the act" is commonplace and does not violate statutory or constitutional rights. That the grand jury indicted plaintiff – which creates a presumption of probable cause – only further insulates the defendants. Plaintiff presents no more than conclusory and unsubstantiated allegations of wrongdoing on the part of the individual defendants. Therefore, the individual Postal defendants are entitled to qualified immunity, and summary judgment is appropriate.

Even if the individual Postal defendants were not entitled to qualified immunity, plaintiff's malicious prosecution claim

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6. Plaintiff cannot maintain a malicious prosecution claim against defendants Wyatt, Kerken or Spielman as there is no evidence whatsoever that they played any role in the investigation of plaintiff.

would fail on the merits. Prior to 1994, the Third Circuit permitted plaintiffs to bring malicious prosecution claims under 42 U.S.C. § 1983 by merely alleging the common law elements of the tort. *See Lee v. Mihalich*, 847 F.2d 66, 69-70 (3d Cir. 1988). Then the Supreme Court decided *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), suggesting that a plaintiff bringing a malicious prosecution claim must allege a claim based on explicit constitutional text, such as the Fourth Amendment's prohibition on seizures. *See Albright,* 510 U.S. at 273, 114 S.Ct. at 813. Admittedly, the law of malicious prosecution is murky in the wake of *Albright*. *See Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) ("*[Albright]* has created great uncertainty in the law."); *Taylor v. Meacham*, 82 F.3d 1556, 1561 n.5 (10th Cir. 1996) (concluding that "*Albright* muddied the waters rather than clarified them."); *Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996) (alluding to the "*Albright* minefield").

The Third Circuit has suggested that *Albright* implies that malicious prosecution is not a constitutional tort. *See Gallo*, 161 F.3d at 222. Rather, the constitutional violation is the deprivation of liberty which typically accompanies prosecution. *See id.* Thus, to maintain a claim for malicious prosecution, a plaintiff must establish the common law elements of the tort, plus show "some deprivation of liberty consistent with the concept of 'seizure'". *Gallo,* 161 F.3d at 222 (quoting *Singer v. Fulton County Sheriff,* 63 F.3d 110, 116 (2d Cir. 1995)).

Although plaintiff has not included § 1983 as a basis for relief in the Complaint, he does allege that the defendants

"maliciously caused [him] to be arrested and prosecuted to suffer, the loss of his liberty. . . ." *Complaint* at ¶ 9. Thus, the Court will assume that § 1983 is the vehicle by which plaintiff asserts his malicious prosecution claim. In *Gallo*, the court held that the plaintiff was "seized," and therefore suffered a deprivation of liberty, where his post-indictment liberty was restricted because he had to post a $10,000 bond, attend all court hearings including his trial and arraignment, and was prohibited from traveling outside of New Jersey and Pennsylvania. 161 F.3d at 223-24. Likewise, plaintiff in this case alleges that he was held in the town jail and released after posting a $30,000 bond, which was later reduced to $10,000. Presumably, plaintiff was required to attend all court hearings, including his arraignment and trial. In accordance with Gallo, the Court finds that this allegation is sufficient to state a deprivation of liberty under *Albright*.

Whether plaintiff's malicious prosecution claim survives summary judgment is another matter. The common law elements of a malicious prosecution claim that plaintiff must also satisfy are as follows: (1) the defendants initiated a criminal proceeding against plaintiff; (2) the criminal proceeding ended in plaintiff's favor; (3) the criminal action was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the criminal defendant (now plaintiff) to justice. *See Luthe v. City of Cape May*, 49 F.Supp.2d 380, 392 (D.N.J. 1999).

Plaintiff's claim for malicious prosecution falls because probable cause existed to believe that plaintiff sold narcotics. Probable cause exists when the official has knowledge or reasonably trustworthy information of facts and

circumstances that are sufficient to warrant a person of reasonable caution in the belief that the defendant committed the crime at issue. *See Weyant v. Okst,* 101 F.3d 845, 852 (2d Cir. 1996). Plaintiff concedes that a grand jury indictment or presentment constitutes *prima facie* evidence of probable cause to prosecute. *See Rose v. Bartle,* 871 F.2d 331, 353 (3d Cir. 1989); *White v. Frank,* 855 F.2d 956, 961-962 (2d Cir. 1988). To overcome that presumption, plaintiff must show that the individual defendants used fraud, perjury, or other corrupt means to procure the indictment or presentment. *See Rose,* 871 F.2d at 353 (citing *White,* 855 F.2d at 961-62).

In this case, a grand jury indicted plaintiff in October 1993. Plaintiff merely lodges self-serving and conclusory allegations of perjured testimony brought before the grand jury. There is no evidence in the record to support his assertions. Thus, plaintiff cannot rebut the presumption of probable cause, that arises out of the grand jury indictment. For this reason, even if the individual Postal defendants were not entitled to qualified immunity, summary judgment is appropriate on behalf of the defendants.[7]

V. Motion for Leave to File an Amended Complaint

Federal Rule of Civil Procedure 15(a) provides that a party may amend the party's pleading by leave of court, and that such leave shall be freely given when justice so requires. Determination of a motion to amend the pleadings is within

7. It is doubtful whether plaintiff meets the remaining elements of a malicious prosecution claim. Nevertheless, the Court need not address the remaining elements as a result of a defendants' strong showing of probable cause.

the discretion of the trial court. *See Ryan v. Collucio*, 183 F.R.D. 420, 423 (D.N.J. 1998). A court may deny a motion to amend if the amendment is found to be futile. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962): *Shane v. Fauver*, 2000 WL 655642, at *1 (3d Cir. May 19, 2000) (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997) and *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413-14 (3d Cir. 1993)).

"Futility means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *Shane v. Fauver*, 2000 WL 655642, at *1 (citing *Burlington*, 114 F.3d at 1434); *Jablonski*, 863 F.2d at 292; *Massarsky v. GM Corp.*, 706 F.2d 111, 125 (3d Cir.), *cert. denied*, 464 U.S. 937, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983). In determining whether an amendment is futile, a district court applies the same standard of legal sufficiency as applied under Rule 12(b)(6). "*See Shane v. Fauver*, 2000 WL 655642, at *1; 3 MOORE'S FEDERAL PRACTICE, § 15.15[3], at 15-47 to -48 (3d ed. 2000). Where the claim is vulnerable to dismissal under Rule 12(b)(6), but the plaintiff moves to amend, leave to amend generally must be granted unless the amendment would not cure the deficiency. *See Shane v. Fauver*, 2000 WL 655642, at *1. This concept is similarly suited for application to summary judgment motions.

Based on the above finds, it is clear that plaintiff's amendment is futile inasmuch as it will not cure any deficiency in plaintiff's initial Complaint. Plaintiff's Amended Complaint adds no new causes of action and alleges no new set of facts. As such, it could not survive summary judgment. Moreover, plaintiff had ample opportunity – four

years in fact – to cure any deficiencies by amending the Complaint. Therefore, plaintiff's motion for leave to file an Amended Complaint is **DENIED,** and plaintiff's Complaint is **DISMISSED**.[8]

CONCLUSION

For the foregoing reasons, the motion of defendants, Postmaster General William Henderson of the United States Postal Service, Linda Wyatt, Martin Spielman, Jeffrey Kerken, Barbara Higgins, Martin C. Dubinski, and Thomas L. Modafferi for summary judgment is hereby GRANTED. Accordingly, plaintiff Patrick Sarullo's Complaint is **DISMISSED** in its entirety and as to all defendants. This case is now CLOSED.

An appropriate Final Order accompanies this Letter Opinion.

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

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8. Because plaintiff's state law claims require the same proofs as the federal claims discussed above, the state law claims fail for the same reasons the federal claims fail. As a result of the Court's ruling, then, the defendants are also entitled to summary judgment on plaintiff's state law claims.

APPENDIX F — FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED OCTOBER 11, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 96-3241

HON. NICHOLAS H. POLITAN

PATRICK SARULLO,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE, et al.,

Defendants.

FINAL ORDER

THIS MATTER having come before the Court on the motion of defendants, Postmaster General William Henderson of the United States Postal Service, Linda Wyatt, Martin Spielman, Jeffrey Kerken, Barbara Higgins, Martin C. Dubinski, and Thomas L. Modafferi for summary judgment, and on the motion of plaintiff Patrick Sarullo for leave to file an Amended Complaint; and the Court having heard oral argument on September 18, 2000, and considered the moving papers of the parties; and for the reasons set forth in the accompanying Letter Opinion; and for good cause shown,

Appendix F

IT IS on this 4th day of October, 2000,

ORDERED that the motion of defendants, Postmaster General William Henderson of the United States Postal Service, Linda Wyatt, Martin Spielman, Jeffrey Kerken, Barbara Higgins, Martin C. Dubinski, and Thomas L. Modafferi for summary judgment be and hereby is **GRANTED,** and plaintiff Patrick Sarullo's Complaint be and hereby is **DISMISSED;** and it is further **ORDERED** that the motion of plaintiff Patrick Sarullo for leave to file an Amended Complaint be and hereby is DENIED.

This case is hereby **CLOSED.**

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

APPENDIX G — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 2, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 96-3241

PATRICK SARULLO,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE; MARVIN T. RUNYON, Postmaster; WILLIAM BROWN, Manager, Human Resources, United States Postal Service; POSTAL INSPECTORS THOMAS L. MODAFFERI, MARTIN C. DUBINSKI, BARBARA HIGGINS; LINDA WYATT, Postmaster; JEFFREY KERKEN, Supervisor; MARTIN SPIELMAN, Supervisor; WILLIAM BROWN, Manager, Human Resources; WILMA MEDERO; NATIONAL ASSOCIATION OF LETTER CARRIERS, BRANCH 38; ROBERT W. GLUCK, Prosecutor of Middlesex County; CHRISTOPHER L.C. KUERIET, Asst. Prosecutor of Middlesex County; MICHAEL LANE, Detective, South Plainfield Police; SOUTH PLAINFIELD POLICE DEPARTMENT,

Defendants.

Appendix G

OPINION

BISSELL, *District Judge*

This matter comes before the Court on a motion for reconsideration of its December 18, 1997 Opinion and Order in this case, wherein the Court: (1) dismissed plaintiff's Title VII and ADEA claims against all defendants except the Postmaster General; (2) dismissed any claims plaintiff may have had under *Bivens*[1] or 42 U.S.C. § 1981, *et seq.*, for damages based on the alleged employment discrimination; (3) dismissed as untimely any *Bivens* claims for defamation and/or false arrest; and (4) determined that a *Bivens* claim against the *moving defendants* for malicious prosecution survived their motion to dismiss. On January 8, 1998, the parties stipulated to the dismissal of all claims against defendants Christopher Kuberiet and Middlesex County Prosecutor Robert Gluck with prejudice. On January 16, 1998, the parties stipulated to the dismissal of all claims against defendants Detective Michael Lane and the South Plainfield Police Department with prejudice.

Presently remaining in this case are the following causes of action: (1) a Title VII claim against the Postmaster General; (2) an ADEA claim against the Postmaster General; and (3) a *Bivens*[2] claim for malicious prosecution against

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1. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. The Court did not hold that a *Bivens* claim for malicious prosecution survived against the Postmaster General. Rather, it clearly

(Cont'd)

the eight individually named postal employees: Brown, Higgins, Wyatt, Dubinski, Modafferi, Kerken, Spielman and Medero (the "Individual Postal Defendants").[3] The Individual Postal Defendants move for reconsideration of the Court's decision only with respect to the claim for malicious prosecution, asserting that the Court lacks subject matter jurisdiction over this claim and, furthermore, that it should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The government represents seven[4] of the eight Individual Postal Defendants named in this action and files the instant motion on their behalf.

(Cont'd)
stated that this malicious prosecution claim survived only as against "the moving defendants." (*See* Dec. 18, 1997 Op. at 17). The Postmaster General was not a moving defendant. Accordingly, he is not a defendant to that claim. Thus, the Court does not address herein the government's arguments with respect to dismissing the Postmaster General from the *Bivens* claim for malicious prosecution (*see* Defendants' Br. at 7 n.9), as these arguments are moot.

3. Despite the Court's determination that the only nondiscrimination claim left in this case is a claim for malicious prosecution, plaintiff continues to assert that he still has valid claims against the individual employees of the Post Office under the Federal Tort Claims Act. (*See* Perone Aff., ¶ 3). Having clearly determined in its December 18th Opinion that these claims are dismissed, the Court disregards these erroneous assertions.

4. (*See* Section of the Court's Analysis, below.)

Appendix G

FACTS

The Court relies on the statement of facts set forth in its December 18th Opinion. (*See* Dec. 18, 1997 Op. at 3-4). In addition, particularly relevant to this motion are the following allegations in plaintiff's Complaint. Plaintiff asserts that Medero, Modafferi, Dubinski and Higgins "did submit false oral and written reports and false trial testimony concerning plaintiff. Defendants jointly and severally willfully, recklessly, wrongfully and maliciously caused plaintiff to be arrested and prosecuted to suffer the loss of his liberty and enjoyment. . . ." (Compl., ¶ 9). Plaintiff also alleges that these defendants (Medero, Modafferi, Dubinski and Higgins) discriminated against plaintiff in retaliation for prior grievances and EEO Complaints." (*Id.*)

With respect to defendants Wyatt, Kerken and Spielman, plaintiff alleges that they "did maliciously lie about, slander and libel plaintiff, causing him to be arrested, imprisoned and maliciously prosecuted and to suffer a loss of enjoyment and liberty." Plaintiff also claims that these defendants (Wyatt, Kerken and Spielman) violated his right to be hired in violation of all of the statutes asserted as the bases of jurisdiction, including 42 U.S.C. § 1981, *et seq.* (Compl., ¶ 14). The Complaint is devoid of allegations with respect to a malicious prosecution claim against defendant Brown.

Appendix G

ANALYSIS

I. Motion for Reconsideration

A. Standard

Motions for reargument, or reconsideration, are governed by Local Rule 7.1 (g).[5] As the Comments to that Rule clearly state, a motion for reconsideration or reargument focuses on, and the required memorandum must address, only those factual or legal matters which counsel believes the Court has overlooked. *See* Comments to Local Rule 7.1(g) (formerly Local Rule 12). Since relief under this Rule is to be granted "very sparingly," *Maldonado v. Lucca*, 636 F. Supp. 621, 630 (D.N.J. 1986), motions for reconsideration succeed only where "dispositive factual matters or controlling decisions of law" were presented to the court but not considered. *McGarry v. Resolution Trust Corp.*, 909 F. Supp. 241 (D.N.J. 1995). Rule 7.1(g) thus provides a court with the opportunity to correct manifest errors of law or fact. It also provides a court with an opportunity to receive newly discovered evidence. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). Such a motion, however, must do more than merely express dissatisfaction with a court's previous decision. A disagreement of that sort "should be dealt with in the normal appellate process, not on a motion under Local Rule [7.1(g)]." *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F. Supp. 159, 162-63 (D.N.J. 1988).

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5. *See also* Fed. R. Civ. P. 59(e); *Fedederal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348 (3d Cir. 1986).

Appendix G

B. The Court Erred with Respect to Defendant Brown

Although they did not raise this concern in connection with the underlying motion, the Individual Postal Defendants are correct in pointing out that the Complaint is devoid of any allegations with respect to a claim for malicious prosecution against defendant Brown. The Court erred when it grouped defendant Brown together with the other moving defendants against whom the Complaint does contain allegations with respect to a malicious prosecution claim. (*See* Dec. 18, 1997 Op. at 13; Compl., ¶¶ 9-10 (containing allegations of malicious prosecution against the other seven Individual Postal Defendants: Medero, Modafferi, Dubinski, Higgins, Wyatt, Kerken and Spielmeyer[6] [sic])).

There being no allegations anywhere in the Complaint that defendant Brown caused plaintiff to be maliciously prosecuted, any claim for malicious prosecution that plaintiff was attempting to assert against him is hereby dismissed pursuant to Fed. R. Civ. P. 12 (b) (6) . Furthermore, as the Court stated in its December 18th Opinion and repeated herein, other than plaintiff's Title VII and ADEA claims against the Postmaster general, only one other claim survived defendants' motion to dismiss: the malicious prosecution claim against the Individual Postal Defendants, which claim is hereby dismissed as to defendant Brown. Accordingly, the Complaint is dismissed in its entirety as to defendant Brown.

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6. The Court assumes that plaintiff means to identify defendant Martin Spielman, not "Martin Spielmeyer," as is written in paragraph 9 of the Complaint.

Appendix G

C. The Court did not Err in its Characterization of Plaintiff's Malicious Prosecution Claim

Unlike with respect to defendant Brown, the Complaint does contain allegations that the other seven Individual Postal Defendants (Medero, Modafferi, Dubinski, Higgins, Wyatt, Kerken and Spielman) "maliciously caused plaintiff to be . . . prosecuted. . . ." (*See* Dec. 18, 1997 Op. at 13; Compl., ¶¶ 9-10). The Court determined that plaintiff had stated a claim for malicious prosecution and characterized that claim as a claim under *Bivens*. The Court stands by its decision that plaintiff has stated a claim for malicious prosecution under *Bivens* that survives a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

It is generally the policy of this Circuit to dismiss complaints only "where it is certain that no relief could be granted under any set of facts that could be proved." *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1395 (3d Cir. 1991) (quoting *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990); *see also Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). In order to have stated a claim under *Bivens*, plaintiff must have alleged that defendants deprived him of some constitutional right. The Court relied on the Third Circuit's opinion in *Rose v. Bartle*, 871 F.2d 331, 348-49 (1989), which sets forth the elements of liability for the constitutional tort of malicious prosecution under 42 U.S.C. § 1983. *See also Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988) ("the elements of liability for the constitutional tort of malicious prosecution under section 1983 coincide with those of the common law tort.") Plaintiff here cannot proceed against the Individual Postal Defendants

under § 1983 because that statute does not authorize a cause of action against federal officials. The elements of a claim for malicious prosecution against them under *Bivens* is, however, the same as it would be under § 1983 — under either rubric, plaintiff must allege and prove the elements of the common law tort of malicious prosecution and, as well, a constitutional violation.

Although malicious prosecution is still cognizable as a constitutional tort under § 1983, in *Abright v. Oliver,* 510 U.S. 266, 269-71 (1994), the United States Supreme Court made clear that in order to assert a § 1983 claim for malicious prosecution, a plaintiff must rely on something *other* than substantive due process as the alleged constitutional violation. Chief Justice Rehnquist, writing for a plurality of the Court, clearly stated that there is no fourteenth amendment substantive due process right to be free from malicious prosecution. (*Id.*) The Supreme Court did not, however, completely foreclose the possibility that a malicious prosecution claim may be actionable under the Constitution; rather, it identified a different constitutional source: the fourth amendment. It thus determined that a cause of action for malicious prosecution was actionable under the fourth amendment in a § 1983 claim. (*Id.*; *Singer v. Fulton-County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995) ("[t]he Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person — *i.e.*, the right to be free of unreasonable or unwarranted restraints on personal liberty); *see also Gallo v. City of Philadelphia*, 975 F. Supp. 723, 726-27 (E.D. Pa. 1997).

Appendix G

The Court stands by its determination that plaintiff has adequately alleged a claim for malicious prosecution under *Bivens*. As the Court determined at pages 12-13 of its December 18th Opinion, plaintiff adequately sets forth the elements of the common law tort of malicious prosecution. Further, he alleges that defendants Medero, Modafferi, Dubinski and Higgins caused him to be maliciously prosecuted "to suffer the loss of his liberty." (Compl., ¶ 9). He alleges that defendants Wyatt, Kerken and Spielman caused him to be maliciously prosecuted "and to suffer a loss of enjoyment and liberty." (Compl., ¶ 10). The Complaint makes clear that plaintiff was arrested in connection with the allegedly false drug charges allegedly brought on by defendants. Although plaintiff may or may not ultimately be able to prove that he was subjected to an unreasonable deprivation of his liberty, he has certainly alleged that such was the case.

The Court notes, as well, that even if it determined that plaintiff had failed to state a claim under *Bivens* for malicious prosecution — *i.e.*, that plaintiff had not alleged a constitutional violation — it would nevertheless have preserved a claim for the common law tort of malicious prosecution against the Individual Postal Defendants. Because plaintiff's Title VII and ADEA claims against the Postmaster General also survived the Individual Postal Defendants' motion to dismiss, the Court would have supplemental jurisdiction over a state law malicious prosecution claim pursuant to 28 U.S.C. § 1367.

Appendix G

D. The Court did not Err in Refusing to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(1)

1. The CSRA

Defendants assert that the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. 95-454, 92 Stat. 1111 (codified as amended in various sections of Title 5, United States Code), precludes this Court from considering plaintiff's claim for malicious prosecution. The CSRA is a comprehensive scheme which, among other things, creates a framework for evaluating adverse personnel actions against federal employees. *Lindahl v. OPM*, 470 U.S. 768, 774 (1985). The avenues of relief for federal employees contained in the CSRA are exclusive and, hence, federal employees are precluded from seeking relief for adverse employment actions in federal district court. *See Yokum v. United States Postal Service,* 877 F.2d 276, 279 n.3 (4th Cir. 1989) (for federal employee seeking review of a discharge "jurisdiction would lie first in the MSPB, and then in the Court of Appeals for the Federal Circuit — but never in the federal district court.") The only exception to the CSRA scheme, which is clearly marked out in the statute, is for discrimination cases, which are subject to the jurisdiction of the federal district court. 5 U.S.C. § 7703(b)(2); *see also Williams v. Department of Army*, 715 F.2d 1485, 1487-88 (Fed. Cir. 1983).

The Court did not overlook the CSRA in its December 18th Opinion; rather, it did not find the CSRA to be relevant to plaintiff's remaining claims and, thus, did not discuss it. Clearly, the CSRA does not preclude the Court from considering plaintiff's discrimination claims under Title VII

and the ADEA. *Williams*, 715 F.2d at 1487-88. Defendants do not argue that the CSRA deprives the Court of subject matter jurisdiction over these discrimination claims; rather, their argument is directed at his only other remaining claim -- for malicious prosecution. Even after reconsidering defendants' arguments, the Court is convinced that the CSRA does not apply to plaintiff's malicious prosecution claim.

The Court essentially agrees with defendants to the extent that their CSRA argument is directed at any of plaintiff's claims based upon adverse *employment-related actions* allegedly taken against him — such as any claims he may have been trying to assert for job-related discrimination, harassment, retaliatory discharge and failure to rehire. The Court determined that these claims should be dismissed, but it rested its determination on grounds other than the CSRA, *e.g.*, because they were preempted by Title VII and/or the ADEA, or because statutes of limitations had expired. (*See* Dec. 18, 1997 Op. at 5-8, 9-10). The effect is the same, of course, and these claims remain dismissed.

Plaintiff's claim that defendants wrongfully caused the State of New Jersey to prosecute him on drug charges, however, is not capable of being characterized as an employment-related grievance or "adverse personnel action" of the sort contemplated by the CSRA. *See, e.g.*, *United States v. Faust*, 484 U.S. 439, 445-47 (1988) (discussing the three main sections of the CSRA governing personnel action taken against members of the civil service). Stated another way, the Court agrees with defendants that the CSRA clearly provides a cause of action for a civil service employee who claims that his or her employer engaged in certain "prohibited

personnel practices," and thereby deprives this Court of jurisdiction over such claims. The Court disagrees, however, that bringing about a state criminal prosecution can be considered a "personnel action," as that term is defined in the CSRA. *See* 5 U.S.C. § 2302(a) and (b).

The Court wants to make clear that it does not conclude that this case presents an exception to the exclusive remedy provision of the CSRA, nor does it conclude, as plaintiff has, that the CSRA does not apply to him. The Court agrees with defendants that the CSRA would preclude review in this Court of any nondiscriminatory adverse employment action taken against plaintiff. The Court concludes, however, that the alleged wrongful institution of criminal proceedings against him by the State of New Jersey does not constitute an adverse employment action under the CSRA. Thus, the Court does not lack subject matter jurisdiction over plaintiff's malicious prosecution claim under the CSRA. Accordingly, the Court did not err in its December 18th Opinion by refusing to dismiss that claim.

2. The Grievance Arbitration Procedure

Defendants argue, as well, that plaintiff is barred by the grievance arbitration procedure that was established between plaintiff and the Post Office from pursuing a claim for malicious prosecution in this Court. This is not an argument that defendants advanced in the motion to dismiss underlying the instant motion for reconsideration. Thus, the Court need not address it. As previously stated, motions for reconsideration are proper where "dispositive factual matters or controlling decisions of law" were presented to the

Court but not considered. *McGarry,* 909 F. Supp. 241; *see also* Comments to Local Rule 7.1(g) (a motion for reconsideration or reargument focuses on, and the required memorandum must address, only those factual or legal matters which counsel believes the Court has overlooked).

Further, the argument lacks merit because it ignores the fact that defendants' underlying motion was a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff need only have stated a legally cognizable claim for relief for malicious prosecution in order to have survived such a motion. Assuming the allegations in the Complaint are true, the Court determined that plaintiff has stated such a claim. Defendants now rely on plaintiff's counsel's representation that plaintiff did, in fact, pursue arbitration of his *employment claims* and that the arbitration was final (*see* Plaintiff's Letter Br., dated Feb. 9, 1998, at 1) to conclude that he is now barred from pursuing a malicious prosecution claim.

Defendants rely on *Ivery v. United States*, 686 F.2d 410 (6th Cir. 1982), a case involving facts remarkably similar to those alleged in the case at bar, wherein the court determined that a Postal Service employee's claim for malicious prosecution was barred because the allegations underlying that claim, which were the same allegations resulting in the plaintiff's removal from his job, had been contested in an arbitration proceeding, wherein the plaintiff lost. Specifically, the plaintiff claimed that he was framed (for pilfering money from mail in his route), and the arbitrator disagreed. The court thus concluded that there was no basis for the plaintiff's claim that he was arrested and criminally prosecuted without probable cause.

It is important to note that, unlike the underlying motion in this case, the motion brought before the court in *Ivery* was a motion for summary judgment. The court had before it evidence on which to conclude that the facts underlying the plaintiff's claims were actually arbitrated. There is no evidence in the pleadings to suggest the same in this case. *Compare Torre v. Falcon Jet Corp.*, 717 F. Supp. 1063 (D.N.J. 1989) (granting summary judgment for defendant because plaintiff was collaterally estopped from relitigating an issue already decided in previous arbitration proceedings, which was actually litigated and necessary to the arbitrator's decision). Furthermore, in *Ivery,* the court expressly stated that there was no suggestion that the arbitration procedures were unfair. 686 F.2d at 413. The arbitrator's decision had been based upon a full adversary evidentiary hearing in which the plaintiff was represented by counsel. There are no allegations that the same is true in the case at bar. To the contrary, plaintiff alleges in the Complaint that he was not represented. (Compl., ¶ 13).

II. The Failure to Serve Defendant Medero

The Individual Postal Defendants argue for the first time in the instant motion for reconsideration that the Court lacks personal jurisdiction over defendant Wilma Medero and that, if the malicious prosecution claim is not dismissed as to all of the postal employees remaining in this action, it should at least be dismissed as to her. As noted above, a motion for reconsideration focuses on, and the required memorandum must address, only those factual or legal matters which counsel believes the Court has overlooked. Clearly the Court

did not overlook the government's argument with respect to Medero because that argument is presented to the Court for the first time in connection with the instant motion.

The government's motion to dismiss this action was expressly filed on behalf of *all* eight postal employees named in the Complaint, *including* Medero. The government specifically represented that its motion to dismiss was submitted on behalf of defendant Medero. (*See* Mem. of Law in Support of Motion to Dismiss at 1). Now, on its motion for reconsideration, the government reveals that since the time of its underlying motion and continuing to today, it has never represented Medero. The government reports that Medero "never requested that the Department of Justice provide representation to her nor has representation for her ever been requested by the Postal Service or granted by the Department of Justice." (*See* Miller Decl.)

Any application to dismiss on behalf of Medero will have to be filed separately. At present, she is a party to this case whom the U.S. Attorney has already purported to represent.

III. The Court will not Convert this Motion

As a final matter, the Court notes the following with respect to the parties' submission of documents outside the pleadings in connection with the instant motion for reconsideration. Despite the Individual Postal Defendants' suggestion that the Court can and should grant summary judgment in their favor at this juncture, the Court determines that it would not be prudent to convert the instant motion. While plaintiff's submission of documents outside the

pleadings may have been enough for the Court to have converted a motion to dismiss into one for summary judgment, the Court stresses that, here, those documents were attached to a motion for reconsideration, an application narrow in scope which will not be transformed.

CONCLUSION

For the reasons discussed herein, the Court determines that by way of its December 18th Opinion and Order: (1) it erred with respect to defendant Brown; and (2) it did not err with respect to defendants Modafferi, Dubinski, Higgins, Wyatt, Kerken, Medero and Spielman. Accordingly, the Individual Postal Defendants' motion for reconsideration is hereby granted in part and denied in part, and this action is dismissed in its entirety as to defendant William Brown.

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: April 2, 1998

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 96-3241

PATRICK SARULLO,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE; MARVIN T. RUNYON, Postmaster; WILLIAM BROWN, Manager, Human Resources, United States Postal Service; POSTAL INSPECTORS THOMAS L. MODAFFERI, MARTIN C. DUBINSKI, BARBARA HIGGINS; LINDA WYATT, Postmaster; JEFFREY KERKEN, Supervisor; MARTIN SPIELMAN, Supervisor; WILLIAM BROWN, Manager, Human Resources; WILMA MEDERO; NATIONAL ASSOCIATION OF LETTER CARRIERS, BRANCH 38; ROBERT W. GLUCK, Prosecutor of Middlesex County; CHRISTOPHER L.C. KUERIET, Asst. Prosecutor of Middlesex County; MICHAEL LANE, Detective, South Plainfield Police; SOUTH PLAINFIELD POLICE DEPARTMENT,

Defendants.

Appendix G

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 2nd day of April, 1998,

ORDERED that the individual Postal Defendants' motion for reconsideration is hereby granted in part and denied in part; and it is further

ORDERED that this action is hereby dismissed in its entirety as to defendant William Brown.

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

APPENDIX H — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED DECEMBER 18, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 96-3241

PATRICK SARULLO,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE; MARVIN T. RUNYON, Postmaster; WILLIAM BROWN, Manager, Human Resources, United States Postal Service; POSTAL INSPECTORS THOMAS L. MODAFFERI, MARTIN C. DUBINSKI, BARBARA HIGGINS; LINDA WYATT, Postmaster; JEFFREY KERKEN, Supervisor; MARTIN SPIELMAN, Supervisor; WILLIAM BROWN, Manager, Human Resources; WILMA MEDERO; NATIONAL ASSOCIATION OF LETTER CARRIERS, BRANCH 38; ROBERT W. GLUCK, Prosecutor of Middlesex County; CHRISTOPHER L.C. KUERIET, Asst. Prosecutor of Middlesex County; MICHAEL LANE, Detective, South Plainfield Police; SOUTH PLAINFIELD POLICE DEPARTMENT,

Defendants.

- Appendix H

OPINION

BISSELL, *District Judge*

This matter comes before the Court on a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) by defendants the United States Postal Service ("USPS") and the eight individually named employees of the Postal Service: William Brown, Barbara Higgins, Linda Wyatt, Martin Dubinski, Thomas Modafferi, Jeffrey Kerken, Martin Spielman and Wilma Medero (the "Individual Postal Defendants"). Plaintiff Patrick Sarullo cross-moves for an order compelling certain discovery.

Plaintiff instituted this action on July 1, 1996. The Complaint alleges that defendants jointly and severally defamed him; caused him false arrest, wrongful imprisonment and malicious prosecution; and discriminated against him on the basis of his race, color, national origin and age, thus causing him the loss of his employment with the USPS. Plaintiff claims violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626 ("ADEA"); the Postal Service Reorganization Act, 39 U.S.C. § 1208(b), (c); the Civil Rights Act of 1991, 42 U.S.C. § 1982 *et seq.*; the New Jersey Law Against Discrimination, ("NJLAD"), N.J.S.A. 10.:5-1 *et seq.*; and the common law of the State of New Jersey. Plaintiff has pursued and exhausted the administrative remedies available under Title VII and the ADEA.

The Court has subject matter jurisdiction over the Complaint pursuant to 28 U.S.C. §§ 1331 and 1367.

Appendix H

I. STATEMENT OF THE CASE

This dispute involves plaintiff's termination from and unsuccessful attempt to regain employment with the USPS in South Plainfield, New Jersey. Plaintiff was fired from the USPS on account of alleged drug dealing activities. He was prosecuted on drug-related charges in the Superior Court of New Jersey, which case resulted in a hung jury. Plaintiff was not retried, and the charges against him were dismissed in February 1995. Thereafter, plaintiff sought to be rehired by the USPS, but the USPS rejected plaintiff's application, and plaintiff filed the instant lawsuit.

Plaintiff's allegations against the moving defendants are twofold: (1) that they (along with the other defendants) discriminated against him on the basis of his race, color, national origin and age, in violation of Title VII and the ADEA (*see* Compl., ¶¶ 9, 12, 14); and (2) that they defamed him and caused his false arrest and malicious prosecution. (*See id.*, ¶¶ 9, 10) .

Appendix H

II. ANALYSIS

A. Plaintiff's Federal Employment Discrimination Claims

1. The Postmaster General is the Only Proper Defendant to Plaintiffs Title VII and ADEA Claims

Plaintiff's claim that defendants have discriminated against him on the basis of his race, color, national origin and age in violation of Title VII and the ADEA must be dismissed against all defendants except Marvin T. Runyon, Jr., Postmaster General. A Title VII action is properly filed only against the head of the relevant federal agency, department or unit in question. *See* 42 U.S.C. § 2000e-16(c); *Owens v. Veterans Administration*, 822 F.2d 408, 411-12 (3d Cir. 1987). Here, the only proper party defendant is Marvin T. Runyon, Jr. Thus, plaintiff's Title VII action must be dismissed against all other persons or entities.

The ADEA does not specify the proper party defendant in federal employment discrimination actions. However, it is indisputable that the ADEA was patterned directly after Title VII. *See, e.g., Lehman v. Nakshian*, 453 U.S. 156, 163-64, 167 n.15 (1981). Furthermore, courts have traditionally applied Title VII procedural provisions to ADEA cases. *See, e.g., Long v. Frank*, 22 F.3d 54, 57 (2d Cir. 1994), *cert. denied* by *Long v. Runyon*, 513 U.S. 1128 (1995). Thus, it seems that with regard to plaintiff's ADEA claim as well, the Postmaster General is the only appropriate defendant.

Based on the foregoing, the Court determines that defendants' motion must be granted with respect to plaintiff's Title VII and ADEA claims.

2. All Other Claims Based on Alleged Federal Employment Discrimination are Barred by Title VII and the ADEA

Plaintiff apparently does not dispute that the Postmaster General is the only proper party defendant to his Title VII and ADEA claims. Rather, he asserts that the Complaint sets forth a basis for a claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the USPS and the Individual Postal Defendants and, thus, that they should not be dismissed from this action. The precise nature of the *Bivens* claim plaintiff means to assert against the moving defendants is unclear. Based on the allegations in the Complaint, however, the Court can discern four possible grounds on which plaintiff could conceivably assert such a *Bivens* claim.

The first possible ground would be for the same alleged employment discrimination that forms the basis of plaintiff's Title VII and ADEA claims. In the First Count of the Complaint, plaintiff alleges that the moving defendants discriminated against him on the basis of his race, color, national origin and age, thereby causing him to lose his job and not be rehired. In *Bivens*, the Supreme Court recognized a tort action for damages founded directly on a violation of a constitutional right. *See Bivens*, 403 U.S. at 396. However, such an action will not lie where there are "special factors counseling hesitation in the absence of affirmative action by

Congress." (*Id.* at 396). Such a "special factor" has been found where there is a claim by a federal employee against a federal employer. *Bush v. Lucas*, 462 U.S. 367, 375-76 (1983). In *Bush*, the Supreme Court rested its analysis on the availability of an adequate alternative remedy under federal statute. (*Id.* at 388-89). That remedy, although not providing for punitive damages, "was specifically designed to provide full compensation" to the aggrieved employee. *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (Marshall, J. concurring).

In *Schweiker v. Chilicky*, the Supreme Court extended the rationale of *Bush* to exclude a *Bivens* action where a federal statutory remedy existed, but did not provide for full compensation. *Schweiker v. Chilicky*, 487 U.S. 412 (1988). Even though "Congress [had] failed to provide for 'complete relief' . . . [and] the creation of a Bivens remedy would obviously offer the prospect of relief for injuries that must now go unredressed," the Court found the statutory remedy sufficient to preclude a direct damages remedy under the Constitution. (*Id.* at 425).

Title VII has been deemed "the exclusive remedy available to an individual federal employee complaining of job-related discrimination." *Gissen v. Tackman*, 537 F.2d 784, 786 (3d Cir. 1976) (dismissing claims under 42 U.S.C. §§ 1981, 1983, 1985 and 1986). The statute's legislative history supports this proposition. The "congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Brown v. General Services Administration*, 425 U.S. 820, 828-29 (1976). Though defendants' motion

does not address plaintiff's claim for relief under 42 U.S.C. § 1981 (presumably because the moving defendants are federal rather than state employees), in light of *Gissen*, the Court determines that, to the extent that plaintiff seeks redress under § 1981 for the employment-related discrimination alleged here, those claims are precluded under *Brown* and, accordingly, must be dismissed from this action. *See* 425 U.S. at 828-29.

The Third Circuit, following the rationale of the Supreme Court in *Schweiker*, has held "that Title VII provides federal employees a remedy which 'precludes actions against federal officials for alleged constitutional violations as well as actions under other federal legislation."[1] *Owens*, 822 F.2d at 409 (citing *Kizas v. Webster*, 707 F.2d 524, 542 (D.C. Cir. 1983)). The Third Circuit has also held that the ADEA preempts judicial remedies based directly on the Constitution for claims of age discrimination in federal employment. *See Purtill v. Harris*, 658 F.2d 134 (3d Cir. 1981). Based on the foregoing, the Court determines that, to the extent that plaintiff is attempting to bring a *Bivens* claim for damages based on the alleged federal employment discrimination, such as claim is precluded by Title VII and the ADEA.[2]

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1. However, the preclusion extends only to damages remedies and does not preclude a court from granting equitable relief for constitutional violations outside the statutory framework. *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995).

2. Plaintiff's *Bivens* claim against the moving defendants here is presumably for damages and not for injunctive relief. Plaintiff does seek reinstatement to his position in the USPS (*see* Compl., First

(Cont'd)

B. Plaintiff's *Bivens* Claims for False Arrest, Defamation and Malicious Prosecution

As the Court has already noted, it was able to discern four possible grounds on which plaintiff could conceivably assert a *Bivens* claim against the moving defendants. While Title VII and the ADEA may be plaintiff's only remedy for the employment discrimination that he alleges, these statutes do not automatically preclude the other constitutional claims he may have. There are three additional grounds on which plaintiff appears to be asserting *Bivens* claims against the moving defendants: (1) false arrest; (2) defamation; and (3) malicious prosecution. *Bivens* is the proper vehicle for bringing such claims against the individual federal employees. The Court addresses each of these possible claims in turn.

Assuming for purposes of this motion that plaintiff has properly pled a claim for false arrest against the moving defendants, the Court determines that such claim must be dismissed as untimely. The United States Supreme Court held in *Wilson v. Garcia*, 471 U.S. 261 (1985), that in the absence of a federal statute of limitations for constitutional tort suits, a court must look to the state's statute of limitations for personal injury actions. In *Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers*, 855 F.2d

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(Cont'd)

Count); however, it is doubtful that plaintiff is attempting to obtain such redress from any of the defendants other than the Postmaster General. Moreover, plaintiff's Title VII and ADEA claims (against the Postmaster General) survive this motion and thus preserve his ability to obtain such relief, if warranted.

1080, 1087 (3d Cir. 1988), the Third Circuit held that the most analogous New Jersey statute of limitations for a *Bivens* action is the two-year New Jersey personal injury statute of limitations. *See* N.J.S.A. 2A:14-2.

Plaintiff was arrested on July 14, 1993. Any *Bivens* claim that plaintiff may have had for false arrest against the moving defendants is barred by the two-year statute of limitations applicable to such claims, because plaintiff clearly knew of the injury alleged here -- namely, the arrest itself -- on July 14, 1993, more than two years before he filed the instant lawsuit. *See Rose v. Bartel*, 871 F.2d 331, 350 (3d Cir. 1989) (citing *Deary v. Three Unnamed Police Officers*, 746 F.2d 185, 197 (3d Cir. 1984).

Plaintiff also attempts to make out a *Bivens* claim against the moving defendants for defamation. (Compl. ¶¶ 9, 10). Plaintiff alleges that the moving defendants' malicious defamation brought about his allegedly wrongful arrest on July 14, 1993. As plaintiff's defamation claim focuses upon alleged acts of libel and/or slander that occurred more than two years before the Complaint in this case was filed -- *i.e.*, prior to July 1994 -- plaintiff's claims based on these alleged acts are also untimely and, therefore, must be dismissed

Any claim that plaintiff may have for malicious prosecution, however, is timely. (*See* Compl., ¶ 17). Again, the appropriate statute of limitations is two years. While the limitations period is derived from state law, the accrual of the cause of action is determined by federal law. *See Chardon v. Fernandez*, 454 U.S. 6 (1981). The Third Circuit has held that an action for malicious prosecution under the Federal

Civil Rights Act does not accrue until the underlying criminal proceedings are terminated in the plaintiff's favor. *See Rose*, 871 F.2d at 349 (citing *McCune v. City of Grand Rapids*, 842 F.2d 903, 907-909 (1988)). The same logic, of course, applies whether the case is a § 1983 action or a *Bivens* action. The state criminal charges were not dismissed against plaintiff until February 1995, and the instant Complaint was filed less than two years later, on July 1, 1996. (*See* Compl., ¶ 11). Thus, plaintiff's *Bivens* claim for malicious prosecution is timely.

Furthermore, plaintiff's *Bivens* claim for malicious prosecution survives the instant motion to dismiss under Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) authorizes a court to dismiss a claim where it either asserts a legal theory that is not cognizable as a matter of law or fails to allege sufficient facts to support a cognizable legal claim. When determining the efficacy of a 12(b)(6) motion, an assumption is made that the factual allegations in a complaint are true; all doubts and inferences are resolved in the pleader's favor. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989); *Markowitz v. Northeast Land Co.*, 906 F.2d 100 (3d Cir. 1990). The result of a motion to dismiss is the streamlining of litigation by dispensing with needless discovery and fact finding. *Neitzke*, 490 U.S. at 327.[3]

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3. The Supreme Court has held that:

> Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law it is clear that no relief could be granted under any set of facts that could be

(Cont'd)

This streamlining must be done in concert with the Third Circuit's policy of dismissing complaints only "where it is certain that no relief could be granted under any set of facts that could be proved." *Unger v. National Residents Matchina Program*, 928 F.2d 1392, 1395 (3d Cir. 1991.) (quoting *Markowitz*, 906 F.2d at 103); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) .

Assuming for purposes of this motion that the allegations in the Complaint are true, the Court determines that plaintiff properly states a *Bivens* claim for malicious prosecution against the moving defendants. The elements of plaintiff's claim for malicious prosecution are derived from state law. Under New Jersey law, a plaintiff must allege that (1) the defendant (to the malicious prosecution action) instituted a criminal action against the plaintiff; (2) the defendant was actuated by malice; (3) there was an absence of probable cause for the criminal complaint; and (4) the criminal case was terminated favorably to the plaintiff. *See Campione v. Adamar of New Jersey, Inc.*, 302 N.J. Super. 99, 120 (App. Div. 1997) (citing *Lind v. Schmid*, 67 N.J. 255, 262 (1975)).[4]

(Cont'd)

> proved consistent with the allegations, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations.

Neitzke v. Williams, 490 U.S. 319, 327 (1989).

4. A grand jury indictment in the underlying prosecution does not compel a finding of probable cause which would bar a malicious

(Cont'd)

Appendix H

In the instant case, it is clear that plaintiff has properly pled the second and fourth elements. (*See* Compl., ¶¶ 9-10 and 11, respectively). The first and third elements of the tort, on the other hand, are not pled so clearly or specifically; however, when all inferences are drawn in plaintiff's favor, as they must be, his allegations are sufficient to withstand this motion to dismiss. Plaintiff does not state outright that the moving defendants are the ones who instituted the state criminal prosecution against him, but he twice alleges that they "caused" him to be arrested and prosecuted. (*See* Compl., ¶¶ 9-10). Further, although plaintiff does not allege that there was an absence of probable cause for his arrest, he implies that all of defendants' alleged wrongful acts against him (including his arrest and prosecution) were done "in retaliation for prior grievances and EEO complaints." (Compl., ¶ 9). These allegations are sufficient to state a claim for malicious prosecution.[5]

C. Plaintiff's Cross-Motion to Compel certain Discovery

In addition to opposing defendants' motion to dismiss, plaintiff cross-moves for discovery of the USPS investigative

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(Cont'd)

prosecution claim as a matter of law; rather such an indictment is evidence supporting the existence of probable cause to be considered together with all other evidence relevant to that issue. *Zalewski v. Gallagher*, 150 N.J. Super. 360 (App. Div. 1977).

5. Plaintiff must also allege and prove a special injury or special grievance resulting from the malicious prosecution. *Brien v. Lomazow*, 227 N.J. Super. 288, 300 (App. Div. 1988), and cases cited therein. The Court is not presently able to state that plaintiff could not prove such an injury here.

materials related to his claims. The Court's disposition of defendants' motion to dismiss does not render this request moot and, thus, the Court addresses it herein.

Plaintiff directs the Court's attention to a letter dated September 19, 1996 (*see* Plaintiff's Br., Exh. U), wherein the USPS, responding to plaintiff's request made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, denies him access to the united States Postal Inspection Service's records pertaining to him. In the letter, the USPS informed plaintiff that the investigative file and report to which his FOIA request was directed is exempt from mandatory disclosure under Exemption 7(A) of FOIA. *See* 5 U.S.C. § 552(b)(7)(A). Plaintiff made this FOIA request on June 11, 1996, before he instituted the instant lawsuit, and there is no indication that he renewed his request as a discovery request in the context of this action. Further, plaintiff is not appealing the denial of his FOIA request to this Court. Rather, he is seeking a separate discovery order to compel the production of these documents.

Fed. R. Civ. P. 37(a) permits the Court to enter an order compelling the discovery of the materials plaintiff seeks, but plaintiff must first demonstrate that defendants failed to make a disclosure that was required of them and, furthermore, that he in good faith conferred with them in an effort to secure the disclosure without court action. *See* Fed. R. Civ. P. 37(a)(2)(A). There is a good argument to be made that, in denying plaintiff's request based on Exemption 7(A) of FOIA, the USPS may have acted improperly. In the September 19th letter, the USPS indicated that Exemption 7(A) applies whenever the government's case in court would

be harmed by the premature release of evidence or information." (*See* Plaintiff's Br., Exh. U (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978)) .

This is an overly broad reading of Exemption 7(A) and it is not one supported by *Robbins Tire*. Exemption 7(A) provides that disclosure is not required of:

> matters that are . . . investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . interfere with enforcement proceedings.

5 U.S.C. § 552(b)(7)(A). The USPS apparently assumes that plaintiff's initiation of the instant lawsuit qualifies as one such "enforcement proceeding," but this interpretation is at odds with the words of the statute. Rather, it seems that "enforcement proceedings" with which interference might be a concern in this case are, for example, the proceedings on the criminal charges brought against plaintiff in state court. In other words, were plaintiff to have sought his investigative file by making a FOIA request during the pendency of the criminal proceedings against him in state court, then it seems that an invocation of Exemption 7(A) would have been appropriate. In the instant action, however, the invocation of the Exemption makes less sense and, moreover, runs contrary to the very purposes of the discovery process.

These observations notwithstanding, the Court determines that plaintiff's present motion to compel such discovery is premature. Plaintiff has not yet requested discovery of his investigative report from defendants .in the

context of this litigation and, thus, he cannot demonstrate that an order directing defendants to compel such documents under Fed. R. Civ. P. 37(a)(2) is necessary. Further, because plaintiff has not sought disclosure of these documents in this litigation, the Court is without the benefit of any arguments defendants may have as to why the documents plaintiff seeks are not discoverable.[6]

III. CONCLUSION

Based on the foregoing, the Court determines that plaintiff's Title VII and ADEA claims must be dismissed against all defendants except the Postmaster General, who is the only proper party defendant to such claims. Further, any claims that plaintiff may have had under *Bivens*, or 42 U.S.C. § 1981 *et seq.* for damages based on the alleged employment discrimination must be dismissed from this action, as such claims are preempted by Title VII and the ADEA. The Court further determines that any *Bivens* claims against the moving defendants for defamation and/or false arrest must be dismissed as untimely. However, plaintiff's *Bivens* claim against the moving defendants for malicious prosecution is timely and survives the instant motion to dismiss. Accordingly, defendants' motion is granted in part and denied in part.

Also based on the foregoing, the Court determines that plaintiff's cross-motion to compel certain discovery is premature and, accordingly, it is denied without prejudice.

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6. As noted above, plaintiff is not invoking this Court's jurisdiction to review the denial of his FOIA request.

Appendix H

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: December 18, 1997

Appendix H

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 96-3241

PATRICK SARULLO,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE; MARVIN T. RUNYON, Postmaster; WILLIAM BROWN, Manager, Human Resources, United States Postal Service; POSTAL INSPECTORS THOMAS L. MODAFFERI, MARTIN C. DUBINSKI, BARBARA HIGGINS; LINDA WYATT, Postmaster; JEFFREY KERKEN, Supervisor; MARTIN SPIELMAN, Supervisor; WILLIAM BROWN, Manager, Human Resources; WILMA MEDERO; NATIONAL ASSOCIATION OF LETTER CARRIERS, BRANCH 38; ROBERT W. GLUCK, Prosecutor of Middlesex County; CHRISTOPHER L.C. KUERIET, Asst. Prosecutor of Middlesex County; MICHAEL LANE, Detective, South Plainfield Police; SOUTH PLAINFIELD POLICE DEPARTMENT,

Defendants.

Appendix H

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 18th day of December, 1997, ORDERED that:

1. The motion of defendants United States Postal Service, William Brown, Thomas L. Modafferi, Martin C. Dubinski, Barbara Higgins, Linda Wyatt, Jeffrey Kerken, Martin Spielman and Wilma Medero for dismissal be and it hereby is granted in part and denied in part. All claims against these defendants are dismissed, except plaintiff's claim against them for malicious prosecution.

2. Plaintiff's cross-motion to compel certain discovery is hereby denied, without prejudice, as premature.

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

APPENDIX I — STATUTE INVOLVED

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III--EMPLOYEES
SUBPART A--GENERAL PROVISIONS
CHAPTER 23--MERIT SYSTEM PRINCIPLES

§ 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

* * *

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any

action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in

section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General

of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

* * * *